Supreme Court, U.S.
FILED

091262 APR 15 2010

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A, FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KUEIGWONG RAT, LUKA AYUOL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG, on behalf of themselves and all others similarly situated,
Petitioners,

vs.

TALISMAN ENERGY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CAREY R. D'AVINO
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000
cdavino@bm.net

(Additional counsel listed on reverse side.)

PAUL L. HOFFMAN
Counsel of Record
Hoffpaul@aol.com
ADRIENNE J. QUARRY
VICTORIA DON
SCHONBRUN DESIMONE SEPLOW HARRIS & HOFFMAN LLP
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731

Attorneys for Petitioners

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (949) 720-1510

(Additional Counsel for Petitioners)

ERWIN CHEMERINSKY
UNIVERSITY OF CALIFORNIA, IRVINE
401 East Peltason Drive, 1095
Irvine, California 92697
(949) 824-7722

JOHN M. O'CONNOR
STANLEY A. BOWKER
ANDERSON KILL & OLICK, P.C.
1251 Avenue of the Americas
New York, NY 10020
(212) 278-1000

RICHARD HEINMANN
ELIZABETH CABRASER
DANIEL E. SELTZ
STEVEN E. FINEMAN
RACHEL GEMAN
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
250 Hudson Street,
8th Floor
New York, NY 10013-1413
(212) 355-9500

QUESTIONS PRESENTED

The questions presented are:

1. Whether under this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), federal common law tort principles or international law provides the standard for civil aiding and abetting or conspiracy liability under the Alien Tort Statute ("ATS"), 28 U.S.C. §1350.

2. Whether the mental element for civil aiding and abetting liability, under either federal common law or international law, permits liability based on a showing that the defendant knowingly provided substantial assistance to gross human rights violations, or whether a plaintiff must also show that the defendant had the purpose to assist such human rights violations.

3. Whether ATS plaintiffs may assert conspiracy or joint criminal enterprise theories of liability based on federal common law or international law and, if so, whether in the context of such joint action, ATS plaintiffs satisfy their burden of proof by demonstrating that the defendant knew of an illegal purpose of the joint criminal enterprise and that it was assisting in achieving that illegal purpose.

PARTIES TO THE PROCEEDING

All parties or petitioners are listed in the caption and are individuals.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

LIST OF APPENDICES vi

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION . 13

I. This Court Should Grant Review to Resolve Issues of National and International Importance, Which Now Divide the Federal Courts, Concerning the Source of Law and Standard for Civil Aiding and Abetting Liability Under the ATS 13

II. Review is Necessary Because the Second Circuit Erred in Appl ying International Law to the Issue of Aiding and Abetting Liability Despite This Court's Ruling in *Sosa* That Such Rules are Governed by Federal Common Law 19

A. Under This Court's Decision in *Sosa*, Federal Common Law Provides the Rules of Liability in Alien Tort Statute Cases 19

B. Under Federal Common Law, the Civil Standard for Aiding and Abetting Liability is Knowing Assistance 24

III. Even if International Criminal Law Provides the Applicable Standard for Aiding and Abetting Liability, Review Should be Granted Because the Court of Appeals' Decision is in Conflict With International Law and With the Decisions of Other Courts That Have Applied International Law in this Context 27

A. Knowledge Was the *Mens Rea* Required For Aiding and Abetting Liability at Nuremberg 28

B. Modern International Criminal Tribunals Have Consistently Found Knowing Assistance to be the *Mens Rea* for Aiding and Abetting Under Customary International Criminal Law 30

C. The Rome Statute Does Not Alter Customary International Law 32

IV. This Court Should Grant Review to Resolve the Conflict Between the Second and Eleventh Circuits Over the Availability of

Federal Common Law Conspiracy Liability Under the ATS 34

CONCLUSION 37

LIST OF APPENDICES

APPENDIX A
OPINION UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED OCTOBER 2, 2009

APPENDIX B
OPINION UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 12, 2006

APPENDIX C
ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC ENTERED NOVEMBER 30, 2009

APPENDIX D
ORDER DENYING MOTION TO FILE *AMICUS CURIAE* BRIEF BY FORMER AMBASSADOR DAVID J. SCHEFFER, DATED NOVEMBER 3, 2009

TABLE OF AUTHORITIES

Page

Cases

Aldana v. Del Monte Fresh Produce, N.A., Inc.,
416 F.3d 1242 (11th Cir. 2005) 13, 34, 35

Almog v. Arab Bank, PLC,
471 F. Supp. 2d 257 (E.D.N.Y. 2007) 14

Astoria Federal Savings & Loan Association v. Solimino, 501 U.S. 104 (1991) 25

Balintulo v. Daimler AG, et al.,
No. 09-2778-CV (2d Cir. Argued
Jan. 11, 2010) 16

Bodner v. Banque Paribas,
114 F. Supp. 2d 117 (E.D.N.Y. 2000) 15

Bowoto v. Chevron Corp.,
No. C99-02506 SI, 2006 U.S. Dist. LEXIS
63209 (N.D. Cal. Aug. 21, 2006) 14

Cabello v. Fernandez-Larios,
402 F.3d 1148 (11th Cir. 2005) . 4-5, 13, 25, 34

Doe v. Exxon Mobil Corporation,
658 F. Supp. 2d 131 (D.D.C. 2009),
appeal docketed, No. 09-7125 (D.C. Oct. 29,
2009)(Indonesia) 16

Doe v. Saravia,
348 F. Supp. 2d 1112 (E.D. Cal. 2004) 14

Doe v. Unocal Corporation,
395 F.3d 932, *vacated by grant of en banc review*, 395 F.3d 978 (9th Cir. 2002) 14

Doe v. Unocal Corporation,
403 F.3d 708 (9th Cir. 2005) 14

Halberstam v. Welch,
705 F.2d 472 (D.C. Cir. 1983) 25, 35

Hilao v. Estate of Marcos,
25 F.3d 1467 (9th Cir. 1994) 22

In re Agent Orange Product Liability Litigation,
373 F. Supp. 2d 7 (E.D.N.Y. 2005) 14

In re Terrorist Attacks on September 11, 2001,
392 F. Supp. 2d 539 (S.D.N.Y. 2005) 14

In re Tesch (The Zyklon B Case),
13 Int'l L. Rep. 250 (1947) 28, 30

Jones v. City of Chicago,
856 F.2d 985 (7th Cir. 1988) 35

Kadic v. Karadzic,
70 F.3d 232 (2nd Cir. 1995) 22, 24

Khulumani v. Barclay National Bank Ltd.,
504 F.3d 254 (2d Cir. 2007) ... 14, 21, 23, 31

Lizarbe v. Rondon,
642 F. Supp. 2d 473 (D. Md. 2009) 14

Mehinovic v. Vuckovic,

198 F. Supp. 2d 1322 (N.D. Ga. 2002) 15

Mujica v. Occidental Petroleum, Corporation,
564 F.3d 1190 (9th Cir. 2009) 16

Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003) . 11

Presbyterian Church of Sudan v. Talisman Energy, Inc., 2004 U.S. Dist LEXIS 17030
(S.D.N.Y. Aug. 30, 2004) 3

Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331 (S.D.N.Y. 2005) . 11

Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp.2d 633 (S.D.N.Y. 2006) ... 1

Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) 1, 16

Prosecutor v. Delalic,
Case No. IT-96-21-T (Nov. 16, 1998) 31

Prosecutor v. Furundzija, Case No. IT-95-17/1-T
(Dec. 10, 1998) 5, 27-28, 31

Prosecutor v. Milutinovic,
Case No. IT-05-87-T (Feb. 26, 2009) 32

Prosecutor v. Ntakirutimana,
Case Nos. ICTR-96-10-A & ICTR-96-17-A
(Dec. 13, 2004) 31

Prosecutor v. Tadic,

Case No. IT-94-1-A (Jul. 15, 1999) 31

Romero v. Drummond Co., Inc.,
552 F.3d 1303 (11th Cir. 2008) 13

Sinaltrainal v. Coca-Cola Company.,
578 F.3d 1252 (11th Cir. 2009) 13, 34

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) ..... *passim*

Talbot v. Janson,
3 U.S. 133 (1795) 20

Tel-Oren v. Libyan Arab Republic,
726 F.2d 774 (D.C. Cir. 1984) 22, 24

Texas Industries., Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 24-25

Thomlinson v. Arriskin,
(1719) 92 Eng. Rep. 1096 (K.B.) 21

United States v. Benner,
24 F. Cas. 1084 (C.C.E.D. Pa 1830) 21

United States v. Flick,
6 Tr. War. Crim., 1217 (1952) 29

United States v. Kimbell Foods, Inc.,
440 U.S. 715 (1979) 24

United States v. Ohlendorf (The Einsatzgruppen Case), 4 Trials of War Criminals Before the Nuremberg Military Tribunals Under

Control Council Law No. 10,
1 (1949) 29

United States v. Von Weizsacker (The Ministries Case), Tr. War Crim. 10 (1949) 29

Statute and Regulations

28 U.S.C.
§ 1254(1) 1
§ 1350 ..... i, 1

50 U.S.C.
§ 1701 6

Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90 11

Article 22(3) 33
Article 25(3)(c) 33
Article 25(3)(d)(ii) 33, 36

Other Authorities

4 William Blackstone, Commentaries,
*72 21

Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461 (1989) 21

Authorization for Use of Military Force,
Pub. L. No. 107-40 § 2(o),

115 Stat. 224 (2001) 17

Breach of Neutrality,
1 Op. Att'y Gen. 57 (1795) 21

Brief for the United States as *Amicus Curiae*, *Talisman*, 582 F.3d 244 (2d Cir. 2009) (No. 07-0016) 16

Chimene I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*,
60 Hastings L. J. 61 (2008) 31

Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*,
6 Nw. U. J. Int'l Hum. Rts. 304 (2008) . 33, 36

Gerhard Werle, *Principles of International Criminal Law*, 330 (2005) 33

John Ruggie, Remarks Prepared for ICJ Access to Justice Workshop, Johannesburg, South Africa (Oct. 29, 2009). 18

Khulumani v. Barclay National Bank Ltd., Petition for Writ of Certiorari, sub nom, Am. Isuzu Motors, Inc., v. Ntsebeza,
553 U.S. 1028 (2008) 15

Matthew Lippman, *War Crimes Trials of German Industrialists: The "Other Schindlers,"*
9 Temp. Int'l Comp. L.J. 173 (1995) 29

Pfizer Inc. v. Abdullahi, 130 S. Ct. 534 (Nov. 2, 2009) (No. 09-34) (mem) 17

Pfizer Inc. v. Abdullahi, Petition for Writ of Certiorari, No. 09-34 (July 8, 2009) 17

Protect, Respect and Remedy: A Framework for Business and Human Rights, U.N. Doc. A/HRC/8/5 (April 7, 2008) 17

Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) on the Establishment of the ICTY, U.N. Doc. S/25704 (May 3, 1993) ... 27

Restatement (Second) of Torts § 876(b) (1979) . 25

Restatement (Third) of Foreign Relations, § 103(2) (1987) 31

Sosa v. Alvarez-Machain, 542 U.S. 692, Brief of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents, *Sosa*, 542 U.S. 692 (No. 03-339)("*Sosa* Historians' Brief"). 20

Trial of Bruno Tesch and two others (The Zyklon-B Case) , 1 law reports of trials of war criminals 93 (Brit. Mil. Ct. 1946) 4-5

The Presbyterian Church of Sudan, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A-1) is reported at 582 F.3d 244 (2d Cir. 2009). The court of appeals' order denying plaintiffs' timely petition for rehearing and for rehearing en banc (App. C-1) was entered November 30, 2009. The opinion of the district court (App. B-1) is reported at 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

JURISDICTION

Petitioners seek review of a final decision of the court of appeals entered on October 2, 2009. A timely petition for rehearing and for rehearing en banc was denied on November 30, 2009. Justice Ginsburg granted petitioners' application for an extension of time to file this petition on April 15, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

STATEMENT OF THE CASE

1. This lawsuit was filed by the Presbyterian Church of Sudan and representative named plaintiffs on behalf of a putative class of non-Muslim residents of southern Sudan. The plaintiffs were attacked by the Sudanese military and militia groups it controlled because they lived in areas identified for oil exploration and development by Talisman Energy, Inc. ("Talisman") and its joint venture partner the Government of Sudan ("GOS").

Talisman joined an existing joint venture with full knowledge that the joint venture depended on and supported GOS military attacks against civilians to expand its oil exploration and production operations. No exploration operations were undertaken before a "buffer zone" was established by coordinated ground and air assaults against the non-Muslim civilian population. Talisman supported the joint venture's "buffer zone" security strategy by: coordinating oil exploration activity with the GOS military; hiring and deploying military advisers to work with the joint venture security staff and GOS military; providing financial resources to a government-aligned militia involved in these attacks; and constructing and maintaining improved airfields where the GOS military based the Antonov bombers and helicopter gunships used for these attacks.

This petition seeks review of the Second Circuit's decision affirming summary judgment in

favor of Talisman.[1] The Second Circuit held that plaintiffs' ATS claims failed because there was no proof that Talisman shared the purpose of committing these human rights violations against plaintiffs, despite evidence of the joint venture's buffer zone strategy. As a consequence, the Second Circuit became the first and only circuit to hold that liability under the ATS does not extend to defendants who knowingly provide practical assistance that has a substantial effect on the commission of such egregious human rights violations.

The Second Circuit's ruling conflicts with this Court's repeated application of general tort rules of liability to give effect to federal causes of action, which should govern liability in this case. The court's holding that the mental element for accessorial liability is purpose under international law, rather than knowledge, also conflicts with more than sixty years of international law jurisprudence dating back to Nuremberg. Contrary to the history and purpose of the ATS, the Second Circuit's new rule will prevent plaintiffs, as a practical matter, from obtaining redress for complicity in violations of paradigmatic human rights norms of central importance to the international community and this country. The Second Circuit's proposed rule will undermine the

---

[1] Talisman is a multinational oil and gas corporation headquartered in Calgary, Alberta, Canada. It does substantial business in the United States and in New York State. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2004 U.S. Dist LEXIS 17030, at **7-8 (S.D.N.Y. Aug. 30, 2004) (finding personal jurisdiction).

accountability of those who have facilitated genocide, war crimes and crimes against humanity.

The Second Circuit's decision warrants review on certiorari for three reasons.

First, the Second Circuit held that international criminal law governs the standard for civil aiding and abetting liability under the ATS. That holding is inconsistent with this Court's decision in *Sosa v. Alvarez-Machain,* 542 U.S. 692, 724 (2004), that civil claims under the ATS are based upon federal common law. The Second Circuit's holding is in direct conflict with the Eleventh Circuit, which has consistently recognized clearly established federal common law standards for civil aiding and abetting liability under the ATS. *Cabello v Fernandez-Larios,* 402 F. 3d 1148, 1158-59 (11th Cir. 2005).

Second, even if the Second Circuit was correct in relying on international criminal law to find the standard for civil aiding and abetting liability, it fundamentally misconstrued international law by imposing a shared or common "purpose" *mens rea* standard, akin to specific intent, that is not applicable to accomplice liability. From the Nuremberg trials to the present, the *mens rea* for criminal aiding and abetting liability in international law has been knowledge that one's assistance will have a substantial effect on the commission of a crime.[2] There is no requirement that the accomplice

---

[2] See, e.g., *Trial of Bruno Tesch and Two Others (The Zyklon B Case),* 1 Law Report of Trials of War Criminals 93

share the *mens rea* of the direct perpetrator. Thus, review is essential to ensure that federal courts uniformly apply the correct international standard in ATS cases.

Finally, conspiracy liability is a well-established theory of civil liability in federal common law. The Second Circuit's reliance on international law for conspiracy liability standards is inconsistent with *Sosa* and in direct conflict with the Eleventh Circuit's application of federal common law principles of conspiracy liability in ATS cases. *Cabello*, 402 F. 3d at 1159. Review is necessary to resolve this conflict and to determine the proper international standard, if applicable.

This case presents an appropriate and timely vehicle for the resolution of these questions, which have vexed the lower courts both prior to and since this Court's decision in *Sosa*. This case comes before this Court on a full evidentiary record after complete discovery, thus, providing context for the legal issues at stake. The issues of the source of law and the standards for civil aiding and abetting and conspiracy liability under the ATS are the dispositive issues upon which the Second Circuit affirmed summary judgment, so these issues are squarely before this Court.

(1947)(Brit. Mili. Ct., Hamburg, Mar. 1-8, 1946); *Prosecutor v Furundzija*, Case No. IT-95-17/1/T, Judgment, ¶ 236 (Dec. 10, 1998).

2. The dispositive issue is whether the Second Circuit adopted the proper legal standards, especially with respect to the mental element for civil aiding and abetting and conspiracy liability. Remand is necessary for the lower courts to re-evaluate the summary judgment record under the proper legal standards.[3] A brief summary of the record is provided below as context for the legal issues presented in this petition.

In 1998, Talisman entered into a joint venture with the GOS[4] to construct an oil pipeline and to explore and develop oil and gas reserves in a vast concession area in southern Sudan.[5] Before doing so,

---

[3] The lower courts questioned whether some of the actions upon which plaintiffs based their claims could be attributed to defendant Talisman. However, this issue was not the basis for the Second Circuit's affirmance of the summary judgment. On remand, there would have to be a determination of whether Talisman's actions amounted to substantial assistance under the proper standard.

[4] In 1997, the United States government designated the GOS as a state sponsor of terrorism. In 2002, President Bush signed the Sudan Peace Act ("SPA"), Pub. L. No. 107-245, 50 U.S.C. §1701 note (2002), which, *inter alia*, found that Sudan has been systematically engaged "in a low-intensity ethnic cleansing" to destroy the societies, cultures and economies of the Dinka, Nuer, and Nuba peoples, SPA § 4(2). J.A. 014019.

[5] Talisman entered into the joint venture by taking over the position held by Arakis, Inc., another Canadian corporation. (App. B-16) Talisman entered into the joint venture directly and then reorganized the formal investment entities for corporate tax purposes by transferring its interest in the joint venture to a chain of international subsidiary

Talisman's senior management team investigated the joint venture's operations and learned that joint venture operations were conducted behind a buffer zone created by the GOS military at the request of the joint venture partners.[6] Talisman learned that the joint venture partners routinely coordinated all exploration and drilling activities with the Sudanese military so that the buffer zone could be created by violently clearing the non-Muslim civilian population prior to the commencement of designated joint venture operations.[7] Most critically, Talisman

---

companies. *See, e.g.*, J.A. 015601 (20:2-19) (deposition of Talisman official describing the structuring Talisman's Sudanese assets for tax purposes). The joint venture partners maintained direct control of the joint venture project through partnership committees. These partnership committees, in which Talisman officials participated actively, in turn directed the operations of the Greater Nile Petroleum Operating Company, Ltd. ("GNPOC"), which was created as a conduit by the partners to coordinate operations on the ground. J.A. 012772 (report stating that international oil companies operate under the auspices of GNPOC, which is an agent sponsored mainly by the GOS).

[6] J.A. 013137 (Talisman CEO informs board of the extent of GOS military presence on project); J.A. 010955 (report by Talisman military consultant that "[t]he military strategy, driven it appears by GNPOC security management, is to create a buffer zone, i.e. an area surrounding both Heglig and Unity camps inside which no local settlements or commerce is allowed.").

[7] J.A. 013883 (61:1-13) (Talisman seconded employee based in Sudan attended daily meetings with GOS military and joint venture security personnel at which exploration and drilling operations were coordinated with GOS military); J.A.

learned that, if it joined the joint venture, it would inevitably be a participant in such violations because the creation of the buffer zone by violent attacks and forced displacement of the non-Muslim population in these areas were essential components of the joint venture's oil exploration and production plan.[8]

The joint venture, using the GOS military, cleared the area of civilians through a series of coordinated air and ground attacks against the non-Muslim civilian population.[9] Prior to the exploration and development of any part of the concession, the GOS military, including militias controlled by the GOS, burned villages and conducted brutal military operations to drive the non-Muslim population into the wilderness without food, shelter or clean water.[10]

013745 (352:04-06) (Vice President of Sudan informs Talisman CEO that 400,000 people had been displaced in or near the concession area by GOS).

[8] J.A. 015166-69 (Talisman management informed that the GOS and joint venture used the GOS military to remove civilians forcibly to create a buffer zone for oil exploration).

[9] J.A. 002271 (U.N. Special Rapporteur report describing forcible population displacement to clear oil producing areas); J.A. 002282 (Canadian government report summarizing evidence linking oil development by the Talisman joint venture with the forced displacement of civilians).

[10] J.A. 013758 (157:12 - 158:20) (Governor of Unity State, Taban Deng Gai's deposition) (GOS cleared villages "using any means from a small rifle shooting to artillery shooting to tank attack, to usage of helicopter gunship to usage of aircraft bombardment and using the Antonov bombers. That

Talisman directly supported the GOS-controlled militias, knowing that they were perpetrating attacks against civilians, to facilitate joint venture operations.[11]

During the time that Talisman was a joint venture partner, GOS Antonov bombers and helicopter gunships indiscriminately bombed and strafed civilian villages from bases built and controlled by the joint venture to provide air support for the ground troops engaged in implementing the

---

was at the request of Talisman . . . .").

[11] J.A. 12580 (The militias are part of the joint venture's security strategy.); J.A. 013888 (186:12-187:18) (testimony that the GOS military and the militia attacked Nialdiu and Mankien villages on orders from the joint venture). Thousands of non-Muslim civilians were killed and injured in these attacks and numerous churches were destroyed to clear areas for oil exploration and development. One of the plaintiffs, Luka Ayuol Yol, a Roman Catholic catechist, was singled out for torture during one of these attacks. J.A. 013443-44 (103:18-108:11). Even a World Food Organization distribution center was targeted in these attacks. J.A. 003016-17 (Talisman report on the gunship attack at Bieh village). After joining the joint venture, Talisman received regular reports from its own employees based in Sudan about continuing human rights violations in and near the concession area that occurred because of the joint venture's oil exploration and development activities. *See, e.g.*, J.A. 011827-29 (Talisman Security Update reporting that gunships were still operating from the joint venture's Unity airstrip and discussing a major offensive by militia with gunship support).

joint venture's buffer zone strategy.[12] The GOS bombers and helicopter gunships were routinely refueled and re-armed at the joint venture airfields, Heglig and Unity, with joint venture fuel, and their crews were quartered there.[13] Talisman made direct payments to expand and upgrade these airfields knowing that they were being used to launch attacks against the local civilian population.[14]

3. This litigation originated as a class action against Talisman filed on November 8, 2001 by two

---

[12] J.A. 010933 (Sudan's Minister of External Relations' statement that the Heglig airport is owned and administered by the oil exploration companies and that security measures in the oil fields are being provided at the request of the companies); J.A. 012941 (Talisman's senior executive in Sudan informed senior Talisman management: "They (GOS) will continue bombing anyway and we would look foolish telling them to stop bombing (they don't have the facility to do accurate bombing.")).

[13] J.A. 012360 (describing how the airstrip and helipad are being used to conduct operations in the war area and how 500 pound bombs are loaded onto Antonovs operating out of the joint venture's Heglig airfield along with the helicopters). *See also* J.A. 013867-880 (Talisman employee Lawrence O'Sullivan's deposition); J.A. 013871 (100: 9-13) (There was a military camp at Unity.); J.A. 013878 (183:11-15) (O'Sullivan saw gunships refuel at Unity.).

[14] J.A. 003092 and J.A. 003100 (documents authorizing expenditures by Talisman for improvements to the airstrips); J.A. 003297 (257:3-260:18) (Talisman CEO Buckee's testimony acknowledging that the GOS' Antonovs and gunships used the Heglig and Unity airstrips for bombing purposes); J.A. 012909 (Talisman report stating that there has been an increase in the use of the Heglig and Unity airstrips by the GOS military).

organizations, including the Presbyterian Church of Sudan, and thirteen individuals, including two Presbyterian ministers and four Nuer and Dinka tribal chiefs.

The district court denied Talisman's motion to dismiss. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) ("*Talisman I*"). After this Court's 2004 decision in *Sosa*, Talisman renewed many of its prior arguments in a motion for judgment on the pleadings. The district court denied this motion. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005)("*Talisman II*"). In both of these rulings, the district court applied the correct mental element of knowledge in reaching its conclusions. *Talisman I*, 244 F. Supp. 2d at 322-24; *Talisman II*, 374 F. Supp 2d at 340. After discovery was completed, Talisman moved for summary judgment, which the district court granted. (App. B-8) For the first time, the district court applied a heightened mental element in its analysis of Talisman's aiding and abetting liability. (App. B-69) Plaintiffs appealed.

The Second Circuit held (1) that international criminal law, rather than federal common law, provides the standard for aiding and abetting liability, and (2) that based on its reading of the Rome Statute of the International Criminal Court ("ICC"),[15] proof of a shared purpose is required to

---

[15] Rome Statute of the International Criminal Court, adopted July 17, 1998, 2187 U.N.T.S. 90 (1998).

prove civil aiding and abetting liability under the ATS. (App. A-29) The court of appeals then held that plaintiffs had not introduced evidence that Talisman's purpose was to facilitate the violations it knew were being committed by the GOS against plaintiffs, App. A-2, 32-41, and affirmed the dismissal of plaintiffs' aiding and abetting claims on that basis. App. (A-2) The Second Circuit also found that conspiracy liability was governed by international law, not federal common law. (App. A-32) Because the court believed that international conspiracy or joint criminal enterprise standards required the same showing of "purpose" as aiding and abetting liability required, it similarly affirmed the dismissal of plaintiffs' conspiracy claims. *Id.*

Plaintiffs filed a petition for rehearing, or rehearing en banc, on October 28, 2009. A large number of *amici curiae*, including the chief U.S. negotiator at the Rome Conference establishing the ICC, Ambassador David Scheffer, submitted briefs demonstrating, *inter alia*, that the court of appeals had misinterpreted international law. The court of appeals refused to allow any of these briefs to be filed, (App. D-1), and denied plaintiffs' petition for rehearing on November 30, 2009. (App. C-1)

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE ISSUES OF NATIONAL AND INTERNATIONAL IMPORTANCE, WHICH NOW DIVIDE THE FEDERAL COURTS, CONCERNING THE SOURCE OF LAW AND STANDARD FOR CIVIL AIDING AND ABETTING LIABILITY UNDER THE ATS.

The courts of appeals are split over both the source and the substance of the proper standard for civil aiding and abetting liability under the ATS. The Second Circuit's holdings — (1) that the proper standard for aiding and abetting liability is found in international law, and (2) that the proper mental element to be applied in such cases is a shared or common purpose — are in direct conflict with a line of decisions issued by the Eleventh Circuit and the overwhelming majority of district courts that have considered the issue.

Specifically, the Eleventh Circuit has applied civil federal common law tort principles to aiding and abetting liability in ATS cases. *See Cabello*, 402 F.3d at 1159.[16] It has also determined that the proper mental element in such cases is the defendant's knowledge that its practical assistance would have a substantial effect on the commission of a human

---

[16] *See also Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th Cir. 2008); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247-48 (11th Cir. 2005).

rights violation that is sufficiently grave to be actionable under *Sosa*. *Id.*[17] The Second Circuit's decision is also in conflict with many district court decisions on this issue which hold that knowledge is the mental element for aiding and abetting under the ATS.[18] Finally, the Second Circuit's decision is also

---

[17] The Ninth Circuit was divided in its only case to address this issue. *Doe v. Unocal*, 395 F.3d 932, 950-51 (2002), *vacated by grant of en banc review*, 395 F.3d 978 (9th Cir. 2003). Two members of the *Unocal* panel held that international law provided the standard for aiding and abetting liability and that the international customary law standard was knowledge, 395 F.3d at 949-50, while observing that this standard was similar to the domestic common law standard. *Id.* at 948 n. 23, 951. The third member of the panel found that federal common law applied to this and other issues under the ATS. *Id.* at 963, 965. The Ninth Circuit granted en banc review to determine the proper source of law (federal common law or international law) for the aiding and abetting standard. The parties settled the *Unocal* case before this issue was resolved en banc. *Doe v. Unocal*, 403 F.3d 708 (9th Cir. 2005). Prior to the *Talisman IV* decision the Second Circuit was similarly divided, holding that aiding and abetting liability is recognized under the ATS but disagreeing on the source of law and standard to be applied. *See Khulumani v. Barclay's Bank Ltd.*, 504 F.3d 254, 270 (2d Cir. 2007) (Katzmann, J., international criminal law applies); *id.* at 286 (Hall, J., concurring and finding that federal common law applies).

[18] *See, e.g., Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 491 (D. Md. 2009); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 288-294 (E.D.N.Y 2007); *Bowoto v. Chevron Corp.*, No. C99-02506 SI, 2006 U.S. Dist. LEXIS 63209, at * 17-19 (N.D. Cal. Aug. 21, 2006); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 91 (E.D.N.Y. 2005); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 554 (S.D.N.Y. 2005); *Doe v. Saravia*, 348 F. Supp 2d 1112, 1148-48 (E.D. Cal. 2004);

inconsistent with this Court's instruction in *Sosa* that federal common law defines the liability standards in ATS cases. *Sosa*, 542 U.S. at 724.

This case presents a particularly compelling vehicle to resolve these issues, because the mental element (1) has been briefed extensively below, including by numerous *amici*; (2) was decided on the basis of a full evidentiary record after complete discovery; and (3) was the central reason for the court of appeals' affirmance of the summary judgment.

Resolution of these issues would be in the interests of ATS plaintiffs, corporate defendants,[19] and interested governments alike.[20] Corporations doing business in New York and Atlanta are now subject to two different standards for accessorial liability under the ATS. There are approximately two dozen pending ATS cases alleging that corporations, U.S. and foreign, have aided and abetted serious human rights violations committed in other

---

Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1356 (N.D. Ga. 2002); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 134 (E.D.N.Y. 2000).

[19] Numerous corporations previously requested that this Court resolve these issues in *Khulumani v. Barclay Nat'l Bank Ltd.*, Petition for Writ of Certiorari, *sub nom, Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).

[20] The United States and a number of foreign governments have filed *amicus curiae* briefs in this case and other ATS cases raising this issue.

countries.[21] These cases often arise in the context of widespread human rights violations condemned by the international community and the U.S. Government. This case is a paradigmatic example of rare but real corporate behavior that conflicts with the most important norms established by the international community — the prohibition against the mass killing of and attacks on civilians.

Corporate defendants have claimed that they are being punished for merely "doing business" with repressive regimes and that such lawsuits interfere with "constructive engagement" or foreign investment. However, knowingly providing practical assistance to the perpetrators of international crimes is not excusable as merely "doing business" with repressive regimes and, hence, aiding and abetting such crimes is an appropriate and well-established basis for civil liability under the ATS. The United States, during the George W. Bush Administration, filed *amicus* briefs, including a brief in this case, opposing civil aiding and abetting liability in ATS cases.[22] The Obama Administration has not yet

---

[21] The pending cases in which aiding and abetting liability is at issue include *Balintulo v. Daimler AG*, No. 09-2778-CV (2d Cir. argued Jan. 11, 2010) (South Africa); *Mujica v. Occidental Petroleum, Inc.*, 564 F.3d 1190 (9th Cir. 2009)(appeal pending) (Colombia); *Doe v. Exxon*, 658 F. Supp. 2d 131 (D.D.C. 2009), appeal docketed, No. 09-7125 (D.C. Oct. 29, 2009) (Indonesia). In each of these cases there have been submissions by the United States and foreign governments.

[22] *See, e.g.*, Brief for the United States as *Amicus Curiae*, *Talisman*, 582 F.3d 244 (2d Cir. 2009) (No. 07-0016).

expressed its views on these issues.[23] Despite this Court's request for Congressional guidance in *Sosa*, 542 U.S. at 731, Congress has not taken action to amend the ATS.[24]

The national and international importance of the issues raised by this petition has been recognized by corporations, human rights advocates, victims, and numerous governments. The international community has displayed a keen interest in corporate complicity cases under the ATS.[25] This Court's timely

---

[23] This Court has requested the views of the United States concerning the pending petition for writ of certiorari in another ATS case. *Pfizer Inc. v. Abdullahi*, 130 S. Ct. 534 (Nov. 2, 2009) (No. 09-34) (mem.). However, that petition does not raise the issue of aiding and abetting liability, which is the most important issue in dispute in almost all corporate ATS cases. Petition for Writ of Certiorari, *Pfizer Inc. v. Abdullahi*, No. 09-34 (July 8, 2009).

[24] In fact, in the context of efforts to contain international terrorism, Congress has expressly codified a knowing practical assistance standard for aiding and abetting liability. *See, e.g.*, Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(o), 115 Stat. 224 (2001).

[25] For example, the United Nations Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, Harvard Professor John Ruggie, has addressed the standards for corporate complicity in his reports. *See, e.g.*, The Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5, April 7, 2008. Indeed, Professor Ruggie has stated that the Second

resolution of the fundamental issues raised by the petition would benefit all interested parties.

The Second Circuit's decision has no basis in the language, history, or purpose of the ATS, or in this Court's decision in *Sosa*. It is a standard that effectively provides *de facto* immunity from ATS liability for corporations and amounts to an amendment to the ATS by judicial action in an arena Congress has not seen fit to enter. Contrary to one of the primary original purposes of the ATS, the Second Circuit's decision, if followed, ensures that corporate aiding and abetting cases would be heard in state courts. Such an outcome would handicap the ability of the federal courts to ensure the uniform application of international customary law in U.S. courts.

Finally, even if this Court agrees that international law governs the issue of aiding and abetting or conspiracy liability under the ATS, it is important that U.S. courts apply the correct international law standards. Review is necessary to ensure that the federal courts apply accepted principles of international law in ATS cases, and not the erroneous standards applied by the court of appeals.

Circuit misinterpreted international standards in applying a "purpose" standard. John Ruggie, Remarks Prepared for ICJ Access to Justice Workshop, Johannesburg, South Africa (Oct. 29, 2009).

II. REVIEW IS NECESSARY BECAUSE THE SECOND CIRCUIT ERRED IN APPLYING INTERNATIONAL LAW TO THE ISSUE OF AIDING AND ABETTING LIABILITY, DESPITE THIS COURT'S RULING IN *SOSA* THAT SUCH RULES ARE GOVERNED BY FEDERAL COMMON LAW.

A. Under This Court's Decision in *Sosa*, Federal Common Law Provides the Rules of Liability in Alien Tort Statute Cases.

Review is necessary because the Second Circuit's decision is in conflict with this Court's reasoning in *Sosa* that the rules of liability in ATS cases are derived from federal common law. The Second Circuit's decision provides no compelling rationale for applying international law to the issues of aiding and abetting or conspiracy liability. This Court should reaffirm the applicability of federal common law to these issues.

In *Sosa*, this Court held that "the common law" provides "a cause of action for the modest number of international law violations with a potential for personal liability," *Sosa*, 542 U.S. at 724. This Court further described the test for determining whether a claim is actionable under the ATS as whether a court should "recognize private claims under federal common law for violations of [an] international law norm." *Id.* at 732. *Sosa* clearly identifies customary international law as the source of law to define primary violations actionable under the ATS, but it

is federal common law itself that provides the liability standards for those complicit in such violations.

The history this Court relied on in *Sosa* further suggests that the Founders expected that common law principles would supply the rules by which ATS cases would be litigated.[26] This approach would have been essential to implement the ATS, because international law did not supply the rules and standards by which tort litigation was conducted in 1789. This remains true today.

Certain issues arising in ATS cases (such as diplomatic immunity) are governed by treaty or statute. Based on this Court's analysis in *Sosa* and the history of the ATS, the rules for issues where there is no governing treaty or statutory provision should be governed by federal common law.

In the early years of the Republic, courts routinely applied the common law in cases involving the law of nations. *See Sosa* Historians' Brief, at ** 11-13. Attribution of liability was, therefore, governed by the common law, which included the law of nations.[27] Civil aiding and abetting was well

---

[26] *Sosa*, 542 U.S. at 724. Brief of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents, *Sosa*, 542 U.S. 692 (No. 03-339)("*Sosa* Historians' Brief").

[27] *See, e.g., Talbot v. Janson*, 3 U.S. 133, 156-58 (1795) (holding defendant liable for violation of international law of neutrality, and applying principles of aiding and abetting

established at common law. *See, e.g., Thomlinson v. Arriskin*, (1719) 92 Eng. Rep. 1096 (K.B.) (noting that one who aids trespass is liable as a trespasser). There were no universally accepted international standards for aiding and abetting piracy in the 18th century. 4 William Blackstone, Commentaries on the Laws of England, 72 (1769). However, there is no doubt that a defendant who provided the necessities for a pirate expedition, knowing of the purpose of the expedition, would be liable for aiding and abetting piracy. Attorney General Bradford, not long after the ATS was enacted, understood this principle and thus referred to the availability of aiding and abetting liability under the ATS with respect to possible claims against U.S. nationals involved in an attack on the British colony in Sierra Leone. *See Breach of Neutrality*, 1 Op. Att'y Gen. 57 (1795). Applying federal common law to such issues is, thus, most consistent with the original understanding of the drafters.

International law itself counsels against looking for substantive international law complicity norms. In 1789, as now, it was well-established that "international law does not specify the means of its domestic enforcement." *Khulumani*, 504 F.3d at 286 (Hall, J., concurring). As the Second Circuit has previously noted, international law "leaves to each

---

without searching international law); *United States v. Benner*, 24 F. Cas. 1084, 1087 (C.C.E.D. Pa 1830) (recognizing common law rule of self defense would exonerate defendant alleged to have infringed on foreign minister's inviolability of person, even though that right is conferred under the law of nations).

nation the task of defining the remedies that are available for international law violations." *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring); *accord Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994). The principle that international law itself need not provide a right to sue, which was discussed in detail by Judge Edwards in *Tel-Oren*, 726 F.2d at 777-82 (Edwards, J., concurring), was adopted by *Sosa*, 542 U.S. at 724, 731. Judge Bork's contrary view in *Tel-Oren*, 726 F.2d at 801-08 (Bork, J., concurring) was expressly rejected. *Sosa*, 542 U.S. at 731.

Moreover, international law simply does not address all of the issues necessary to litigate tort cases in domestic courts. Tort liability is primarily a concern for domestic enforcement, not international tribunals, and the Founders — by utilizing common law tort liability in the ATS to enforce the law of nations — created an effective, immediately enforceable means of fulfilling our Nation's obligations to enforce the law of nations.[28]

Sosa held that the ATS grants jurisdiction over causes of action present in federal common law. 542 U.S. at 732. The only question for which *Sosa* requires reference to international law is whether there has been a "violation of [an] international law

---

[28] Anne Marie-Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461 (1989).

norm." *Id.* The question of whether a defendant is liable for participating in such a violation is ancillary to the question of whether there has been a violation of an international norm; it does not affect the determination of whether the plaintiff's rights have been violated. While the *right* violated comes from international law, Congress has provided for tort remedies in the ATS, and the scope of this *remedy* is a question of federal common law.

Once an "alien" plaintiff has stated a tort claim for a violation of a *Sosa*-qualifying violation of the "law of nations," federal courts have jurisdiction over the claim. Accessorial rules such as aiding and abetting, by contrast, are not part of a distinct "norm or violations of the law of nations." *See Khulumani*, 504 F.3d at 280-81 (Katzmann, J., concurring) (explaining that "aiding and abetting is a theory of liability for acts committed by a third party," not "an offense in itself").

The Second Circuit declined to apply federal common law in this case, reasoning that *Sosa* points to "international law to find the standard for accessorial liability" because "secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place." App. A-30. The court believed that footnote 20 in *Sosa*, which the court of appeals conceded referred to a different issue, supported the "broader principle that the scope of liability for ATS violations should be derived from international law." App. A-29. The court of appeals' "importance" standard for choosing between international and federal common law in resolving

choice of law issues has no basis in the language, history, or purpose of the ATS and is in conflict with *Sosa*.

Footnote 20 in *Sosa* related only to the issue of whether the "law of nations" violation asserted by an ATS plaintiff extended liability directly to private parties or whether the norm required state action.[29] Footnote 20, as the court of appeals recognized, did not deal with accessorial liability or what source of law applies to that issue in ATS cases. The issue of accessorial liability was not before this Court in *Sosa*. The Second Circuit's misinterpretation of footnote 20 is directly contrary to the careful historical analysis and limits central to this Court's holding and reasoning in *Sosa*. This Court should grant the writ to resolve the conflict between the Second and Eleventh Circuits and to hold that federal common law's civil tort principles provide the standard for civil aiding and abetting liability under the ATS.

B. Under Federal Common Law, the Civil Standard for Aiding and Abetting Liability is Knowing Assistance.

This Court typically applies general tort rules of liability to give effect to federal causes of action. *See United States v. Kimbell Foods*, 440 U.S. 715, 727 (1979); *Texas Indus., Inc. v. Radcliff Materials, Inc.*,

---

[29] *Sosa*, 542 U.S. at 732 n. 20 (citing to *Tel Oren* , 726 F.2d 774 and *Kadic*, 70 F.3d. 232, two cases which address the state action issue).

451 U.S. 630, 641 (1981). Generally, "Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). Under these common law rules, it is well-established that the mental element for civil aiding and abetting civil liability is *knowingly* providing practical assistance that has a substantial effect on the commission of the tort. Aiding and abetting civil tort liability attaches where a third person "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other." Restatement (Second) of Torts § 876(b) (1979); *see Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983).

The Eleventh Circuit has adopted this federal common law tort standard for aiding and abetting liability in ATS cases, finding that to establish liability for aiding and abetting, plaintiffs must plead that (1) wrongful acts were committed; (2) the defendant substantially assisted the person who committed or caused the wrongful acts; and (3) the defendant knew that his or her actions would assist in the illegal or wrongful activity at the time the assistance was provided. *Cabello*, 402 F.3d at 1158.

By adopting civil tort principles for aiding and abetting liability, the Eleventh Circuit did not adopt idiosyncratic principles unique to American law. The factors set forth in Restatement § 876(b) and *Halberstam* are virtually identical to the factors for aiding and abetting liability in international criminal law. It is only because the Second Circuit

misinterpreted international law that the choice between federal common law and international law on this issue matters in this case.

The Second Circuit's introduction of criminal *mens rea* requirements derived from the uninterpreted statute of a single international criminal tribunal is in conflict with the First Congress' intent to provide civil tort remedies for violations of the law of nations. The Founders knew the difference between civil tort remedies and criminal law, as this Court recognized in *Sosa*. 542 U.S. at 714. Moreover, in enacting the ATS, the Founders intended to allow civil tort cases implicating international law to be litigated in the federal courts. *Sosa* Historians' Brief, at *2-3. Applying a more restrictive aiding and abetting standard than the common law standard would have the opposite effect, ensuring that many such cases would only be litigated in state courts. Thus, applying these common law tort principles in ATS cases accords with the history, purpose and language of the ATS.

III. EVEN IF INTERNATIONAL CRIMINAL LAW PROVIDES THE APPLICABLE STANDARD FOR AIDING AND ABETTING LIABILITY, REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH INTERNATIONAL LAW AND WITH THE DECISIONS OF OTHER COURTS THAT HAVE APPLIED INTERNATIONAL LAW IN THIS CONTEXT.

Even if international criminal law does provide the standard for aiding and abetting liability, the court of appeals fundamentally misconstrued the international standard. Under customary international law, a criminal defendant may be found guilty for aiding and abetting when he knows that his acts of assistance have a substantial effect on the violations. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 234-35, 245 (Dec. 10, 1998).[30]

The Second Circuit's holding that the mental element requires a common or shared purpose is based on a fundamental misinterpretation of the

---

[30] The International Criminal Tribunal for the Former Yugoslavia ("ICTY") has been directed by the Security Council to apply norms that "are beyond any doubt customary law." The Secretary General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) on the Establishment of the ICTY*, ¶ 34, U.N. Doc. S/25704 (May 3, 1993). The discussion of the customary international law standards for criminal aiding and abetting liability in *Furundzija* is comprehensive and has been followed by the ICTY and International Criminal Tribunal for Rwanda ("ICTR") for more than a decade.

standard for accessory liability since Nuremberg. Under the Second Circuit's rule, industrialists convicted after World War II for aiding and abetting Nazi crimes might not be found civilly liable to their victims.

Even if international criminal law provides the standard for aiding and abetting liability, review in this Court is necessary to determine the proper standard.

A. Knowledge Was the *Mens Rea* Required For Aiding and Abetting Liability at Nuremberg.

The overwhelming weight of authority from the International Military Tribunal ("IMT") at Nuremberg, and subsequent zonal trials held by the United States and its allies under Control Council Law No. 10, establishes that knowledge, not purpose, is the *mens rea* standard for criminal aiding and abetting liability under international law. For example, two top officials of the firm that supplied the poison Zyklon-B gas for Nazi gas chambers *knowing* it would be used to kill concentration camp prisoners were convicted for their assistance using the Nuremberg principles established by the IMT. *See Zyklon B Case, supra.*[31]

---

[31] As the ICTY found, the officials' purpose was to sell Zyklon-B for profit, which, since Zyklon-B also had lawful uses, could have been a lawful goal pursued by lawful means. *Furundzija*, at ¶ 238. The "charge as accepted by the court was that they knew what the buyer in fact intended to do with the

In the subsequent Nuremberg Military Tribunals ("NMT") held by the United States under Control Council Law No. 10, the *mens rea* for aiding and abetting liability again was knowledge, not purpose. In the *Einsatzgruppen* case [Trial No. 9], two defendants were convicted under a knowledge standard.[32] Similarly, in *United States v. Flick* [Trial No. 5], the NMT convicted industrialists Flick and Steinbrinck, in part, because they contributed financial support to the S.S. with knowledge of the crimes the S.S. was committing, even though they did not condone those crimes. 6 Tr. War. Crim., 1217-22 (1952). The NMT held that "[o]ne who knowingly by his influence and money contributes to the support [of a violation of international law] thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes." *Id.* at 1222.

The Second Circuit ignored all of these precedents. Instead, it relied exclusively on its misinterpretation of *The Ministries Case*[33] [Trial No. 11] to conclude erroneously that purpose was the

---

product they were supplying." *Id. See also* Matthew Lippmann, *War Crimes Trials of German Industrialists: The "Other Schindlers,"* 9 TEMP. INT'L & COMP. L.J. 173, 181-82 (1995).

[32] *United States v. Ohlendorf (The Einsatzgruppen Case)*, 4 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 ("Tr. War Crim."), 1, 569, 572-73 (1949).

[33] *United States v. Von Weizsacker (The Ministries Case)*, 14 Tr. War Crim. 308 (1949).

standard applied at Nuremberg. (App. A-31) However, defendant Karl Rashe's acquittal was based on the Tribunal's conclusion that making a loan did not amount to criminal conduct and was, thus, an insufficient *actus reus*, not on any determination that the *mens rea* standard was purpose. Thus, *Ministries* applied the principle that knowledge is the proper *mens rea* for criminal aiding and abetting liability.

The Second Circuit's decision, therefore, undermines Nuremberg principles by requiring an even higher standard than was used to impose criminal liability, including the death penalty.[34] This heightened standard would make it difficult to impose civil liability on defendants found guilty for Nazi crimes. Left unaltered, the Second Circuit's decision will weaken international standards in both domestic and international fora.

B. Modern International Criminal Tribunals Have Consistently Found Knowledge to be the *Mens Rea* for Aiding and Abetting Liability Under Customary International Criminal Law.

Knowledge is the well-established *mens rea* for aiding and abetting liability applied in contemporary international criminal tribunals, which have been instructed to apply customary international law. The

---

[34] For example, in the *Zyklon-B* case, defendants Tesch and Weinbacher were convicted based on knowledge and thereafter executed. *Zyklon-B*, at 102.

court of appeals erred in finding that "no [sufficient international] consensus exists for imposing liability on individuals who knowingly (but not purposefully) aid and abet a violation of international law." App. A-30. This statement is simply wrong. Applying the jurisprudence of Nuremberg, the ICTY, and the ICTR have consistently held that the *mens rea* for aiding and abetting in customary international law is knowledge.[35]

The ICTY, after undertaking a "detailed investigation" of post-World War II case law, found that knowledge was the accepted *mens rea* for aiding and abetting liability.[36] The ICTY has adhered to this view of the *mens rea* for aiding and abetting under customary international law from its first case to the present, in decisions by both the Trial and

---

[35] *See Khulumani*, 504 F.3d at 275 (Katzmann, J., concurring). Restatement (Third) of Foreign Relations, § 103(2) (1987). *See generally*, Chimene I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 Hastings L. J. 61, 86-96, 103 (2008).

[36] *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶¶321, 326-29 (Nov. 16, 1998); *see also Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶229 (Jul. 15, 1999); *Furundzija*, ¶ 245 (finding that "the clear requirement in the vast majority of the [Nuremberg-era] cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime."). The ICTR has also recognized a knowledge standard for the *mens rea* element for criminal aiding and abetting liability. *Prosecutor v. Ntakirutimana*, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Judgment, ¶ 501 (Dec. 13, 2004).

Appellate Chambers, and in decisions handed down after the adoption of the Rome Statute.[37]

This consistent line of case law from the international tribunals, in applying the knowledge standard, demonstrates a clear consensus in customary international law. The ICTY is required by Security Council decision to apply universally accepted principles, unlike the ICC whose work is governed by a treaty negotiated by the parties. Thus, ICTY decisions are intended to reflect the law of nations. The Second Circuit ignored these essential precedents and offered no reason for doing so.

C. The Rome Statute Does Not Alter Customary International Law.

In relying on its mistaken reading of the Rome Statute to determine that the *mens rea* for civil aiding and abetting liability is shared purpose, the Second Circuit departed from sixty years of customary international law that establishes a *mens rea* of knowledge.

The Rome Statute did not supersede this comprehensive body of international jurisprudence. The Rome Statute established a unique court with a specific mandate and limited jurisdiction, and was

---

[37] *See, e.g.*, *Prosecutor v. Milutinovic*, Case No. IT-05-87-T, Judgement, ¶ 94 (Feb. 26, 2009) ("[T]he accused must have knowledge that his acts or omissions assist the principal perpetrator or intermediary perpetrator in the commission of the crime or underlying offense.").

the product of political negotiation. There was no intent on the part of the negotiating parties to restrict customary international law in the Rome Statute. In Article 25(3)(d)(ii), the Rome Statute specifies a knowledge *mens rea* for those assisting crimes committed by a group acting with a common purpose. Thus, the ICC may interpret this provision, applicable to the facts of this case, to require a *mens rea* of knowledge, not purpose.[38]

The Second Circuit relied on the language of Article 25(3)(c) of the Rome Statute in adopting its "purpose" standard. (App. A-31) Significantly, the provision the Second Circuit relied on has not yet been interpreted by the ICC, nor has the relationship between this provision and Article 25(3)(d)(ii) been established. Thus, the precise *mens rea* for aiding and abetting liability in the Rome Statute is at best uncertain, leaving no basis to conclude that this standard was intended to supersede the established customary international law standard of knowledge.[39]

---

[38] *See* Gerhard Werle, *Principles of International Criminal Law* ¶¶ 306-307, 330 (2005); Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 Nw. U. J. Int'l Hum. Rts. 304, 314 (2008).

[39] In Article 22(3) the Rome Statute explicitly states that its definition of crimes "shall not affect the characterization of any conduct as criminal under international law independently of this Statute."

IV. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN THE SECOND AND ELEVENTH CIRCUITS OVER THE AVAILABILITY OF FEDERAL COMMON LAW CONSPIRACY LIABILITY UNDER THE ATS.

The Second Circuit also rejected plaintiffs' federal common law conspiracy claim under a similar two-step analysis. First, it held that international law governed this issue. Second, it held that the *mens rea* for any conspiracy theory of liability under international law was purpose. On this basis, it affirmed the summary judgment because it found that plaintiffs had not made an adequate showing of purpose. (App. A-2) Both aspects of this analysis are incorrect.

Review is, therefore, necessary for the same reasons set forth in § I, *supra*: (1) the Second Circuit's adoption of international law is in direct conflict with the same line of Eleventh Circuit decisions adopting federal common law civil conspiracy liability, and is inconsistent with *Sosa*; and (2) the Second Circuit's analysis of conspiracy liability under international law was erroneous.

As the Eleventh Circuit repeatedly has held, federal common law supplies the standard for civil conspiracy liability in ATS cases. *See Cabello,* 402 F.3d at 1159.[40] Federal common law precedents

---

[40] The Eleventh Circuit has applied this standard in ATS cases. *See, e.g., Sinaltrainal*, 578 F.3d at 1267-69; *Aldana*,

apply here for the same reasons they apply to aiding and abetting liability. *See* § I, *supra*. Common law conspiracy liability does not require a showing of "purpose." In *Halberstam*, the D.C. Circuit found the co-defendant common law wife liable for conspiracy because she had knowledge of the criminal activities and was a willing partner in his criminal activities. 705 F.2d at 486.

Talisman's actions fit the requirements of civil conspiracy exactly. *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988) ("To be liable as a conspirator you must be a voluntary participant in a common venture, although you need not have agreed on the details of the conspiratorial scheme or even know who the other conspirators are. It is enough if you understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do your part to further them."). Talisman entered into a common venture with the GOS. The exploration and development of oil was a lawful act, but it was implemented through the deliberate commission of systematic human rights violations with the support of the joint venture partners. Talisman knew about most of these acts, but it did not need to have complete knowledge. These violations were carried out to further the common venture and caused the plaintiffs' injuries. The human rights violations were done pursuant to the common scheme. There is no requirement that each conspirator share a common purpose or specifically

---

416 F.3d at 1248.

intend that any particular violation or injury occur. A conspirator can regret that innocent people are harmed by the common venture and still be liable as a conspirator.

Even if international law, rather than federal common law, supplies the standard for conspiracy or joint criminal enterprise liability, review is necessary to determine the mental element for such liability under the ATS.[41] Under the Rome Statute, a defendant's contribution to the commission of a crime by a group of persons acting with a common purpose may be the basis of criminal liability if it is done with *knowledge* of the group's intention to commit the crime. Rome Statute, art. 25(3)(d)(ii) (emphasis added).[42] The Second Circuit did not explain why it relied on the Rome Statute to find that the *mens rea* for aiding and abetting liability is purpose while ignoring the provisions of the Rome Statute specifiying a *mens rea* of knowledge for group action for a joint criminal enterprise liability. This inconsistency underscores the need for review so this Court can articulate the proper international law standard if that source of law provides the standard.

---

[41] The Second Circuit recognized joint criminal enterprise as the international law equivalent of conspiracy liability. (App. A-33)

[42] *See* Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. Unv. J. Int'l Hum Rts. 304 (2008).

CONCLUSION

For all of these reasons the petition should be granted.

Dated: April 15, 2010.

Respectfully submitted,

Paul L. Hoffman
Counsel of Record
Schonbrun DeSimone Seplow
Harris & Hoffman LLP
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731

Carey R. D'Avino
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA. 19103
(800) 424-6690
Counsel for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2008

582 F.3d 244; 2009 U.S. App.
LEXIS 21688

Argued: January 12, 2009
Decided: October 2, 2009

Docket No. 07-0016-cv

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A, FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KUEIGWONG RAT, LUKA AYUOL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG, YIEN NYINAR RIEK AND MORIS BOL MAJOK, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

-v.-

TALISMAN ENERGY, INC.,

Defendant-Appellee,

REPUBLIC OF THE SUDAN,

Defendant.

Before: JACOBS, Chief Judge, LEVAL and CABRANES, Circuit Judges.

Appeal from a grant of summary judgment in favor of Talisman Energy, Inc. ("Talisman") on Plaintiffs-Appellants' claims under the Alien Tort Statute. The United States District Court for the Southern District of New York (Cote, J.) held that to establish accessorial liability for violations of the international norms prohibiting genocide, war crimes, and crimes against humanity, plaintiffs were required to prove, inter alia, that Talisman provided substantial assistance to the Government of the Sudan with the purpose of aiding its unlawful conduct. We agree, and affirm dismissal on the ground that plaintiffs have not established Talisman's purposeful complicity in human rights abuses.

OPINION

DENNIS JACOBS, Chief Judge:

Plaintiffs-Appellants are Sudanese who allege that they are victims of human rights abuses committed by the Government of the Sudan in Khartoum ("the Government") and that Talisman Energy, Inc. ("Talisman"), a Canadian corporation, aided and abetted or conspired with the Government to advance those abuses that facilitated the development of Sudanese oil concessions by Talisman affiliates. Plaintiffs appeal from a judgment of the United States District Court for the Southern District of New York (Cote, J.) dismissing their claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350.

We hold that under the principles articulated by the United States Supreme Court in *Sosa v. Alvarez-Machain,* 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004), the standard for imposing accessorial liability under the ATS must be drawn from international law; and that under international law, a claimant must show that the defendant provided substantial assistance with the purpose of facilitating the alleged offenses. Applying that standard, we affirm the district court's grant of summary judgment in favor of Talisman, because plaintiffs presented no evidence that the company acted with the purpose of harming civilians living in southern Sudan.

It becomes necessary to set out at some length the background of the hostilities in the Sudan; the history of the oil enterprise, its facilities and corporate structure; the security measures taken by the enterprise and by the Government; the injuries and persecutions alleged; and the extent and nature of Talisman's connection to the human rights abuses.

BACKGROUND

A. Civil War in the Sudan

At the time Sudan obtained its independence from Britain and Egypt in 1956, civil war broke out between the Arab-dominated Islamic regime in the north, and the non-Muslim African population in the south.[1] In 1972, the two sides reached a power-

---

[1] The facts are set forth in detail in the district court's summary judgment decision. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 641-61

sharing agreement in Addis Ababa, Ethiopia, after which relative stability ensued until an anti-Government uprising in 1983.

In 1991, southern rebels fractured, and the factions fought the Government and each other, with large-scale displacement and death among civilians.

In April 1997, the Government signed the Khartoum Peace Agreement ("KPA") with several (but not all) of the southern rebel groups. The KPA provided for religious freedom, a cease-fire, sharing of resources and power between the north and south, creation of a "Coordinating Council" of factions in southern Sudan, and the consolidation of most of the rebel militias into the South Sudan Defense Force ("SSDF"), which was aligned with the Government, but with a measure of autonomy and control in the south. The benefits of this agreement were short-lived: the SSDF split into warring factions by 1998, and competing militia groups continued fighting each other and the Government. This violence continued throughout the time that Talisman operated in the Sudan.

B. Oil Development in the Sudan

After Chevron discovered oil in southern Sudan in 1979, the Government granted development rights to foreign companies for six numbered "blocks."

In August 1993, a Canadian company named State Petroleum Company ("SPC") purchased the

---

(S.D.N.Y. 2006). We recount only those facts that bear upon the disposition of the appellate issues.

rights to develop blocks 1, 2, and 4. In 1994, SPC was acquired by, and became a wholly owned subsidiary of, another Canadian company, Arakis Energy Corporation ("Arakis").

In December 1996, SPC formed a consortium with three other companies: China National Petroleum Corporation ("CNPC"), Petronas Carigali Overseas SDN BHD ("Petronas"), and Sudapet, Ltd. ("Sudapet") (collectively "the Consortium"), which were wholly owned by China, Malaysia, and the Republic of the Sudan, respectively. The Consortium members signed agreements among themselves and with the Government concerning oil exploration, production, and development, as well as the construction of a pipeline from the Consortium's concession area to the Red Sea. More than half of the Consortium's profits accrued to the Government.

The Consortium members conducted operations through a Mauritius corporation, called the Greater Nile Petroleum Operating Company Limited ("GNPOC"), which was owned 40% by CNPC, 30% by Petronas, 25% by SPC, and 5% by Sudapet.

C. Talisman's Purchase of Arakis

In October 1998, Talisman acquired Arakis and its 25% stake in GNPOC. The purchase of Arakis was effectuated through Talisman's indirect subsidiary, State Petroleum Corporation B.V., which was later renamed "Talisman (Greater Nile) B.V." ("Greater Nile") on December 10, 1998. Greater Nile was a wholly owned subsidiary of Goal Olie-en-Gasexploratie B.V., which at the time was wholly owned by British companies. The British companies

were wholly owned subsidiaries of Talisman Energy (UK) Limited, which was a direct and wholly owned subsidiary of Talisman.

Before purchasing Arakis, Talisman engaged in several months of due diligence: meetings between senior Talisman executives and governmental and security officials in the Sudan; conversations with GNPOC employees and visits to GNPOC development sites; reports on security conditions in the country; roundtable discussions in Canada with representatives of non-governmental organizations, church groups, and other stakeholders; and consultations with representatives of the British government, which controlled the Sudan in condominium with Egypt from 1899 to 1956.

Among their many meetings, Talisman CEO Jim Buckee and other Talisman officers met with Rick Machar ("Machar"), then the First Assistant to the President of the Sudan and head of the Southern Sudan Coordinating Council ("SSCC") and the SSDF. Sudanese officials, including Machar and Unity State Governor Taban Deng Gai, provided assurances concerning safety, security, and peace.

Robert Norton, the head of security for Arakis in the Sudan from 1994 to 1998, advised Talisman that the oil fields were protected both by the military and by Government-sponsored militias. Norton opined that, though Talisman's assistance would greatly advance oil exploration, it would tip the military balance in favor of the Government. Norton believed that Talisman should not invest in the Sudan.

A representative of Freedom Quest International also discouraged Talisman from investing in the

Sudan, warning senior Talisman officials that GNPOC and the Government used the Sudanese military to expel civilian populations from villages in order to create a "*cordon sanitaire*" ("buffer zone") around oil fields.

D. Security Arrangements for GNPOC

Because GNPOC's operations took place amidst civil war, security arrangements were made for Consortium personnel in coordination with the Government and military forces. Plaintiffs contend that these arrangements resulted in the persecution of civilians living in or near the oil concession areas.

In May 1999, GNPOC and the Government built all-weather roads traversing the oil concession areas and linking the concessions to military bases. To protect GNPOC's employees and equipment, these roads served the dual purposes of moving personnel for oil operations and facilitating military activities. According to plaintiffs, these roads enabled the military to operate year-round in areas prone to seasonal flooding, enhancing the military's ability to launch attacks.

In 1999-2000, GNPOC upgraded two airstrips in the concessions--Heglig and Unity--for the safety and convenience of GNPOC personnel. The improvements also had the effect of supporting military activity, because the Government began using the airstrips to supply troops, take defensive action, and initiate offensive attacks.

Heglig, in particular, was used extensively by the military. Talisman employee saw outgoing flights by helicopter gunships and Antonov bombers. One

Talisman security advisor observed 500-pound bombs being loaded on Government-owned Antonov bombers at Heglig and regular bombing runs from the airstrip. At both Heglig and Unity, GNPOC personnel refueled military aircraft, sometimes with GNPOC's own fuel.

During the time that Greater Nile was a member of the Consortium, it employed former soldiers as security advisors who traveled throughout the concession areas, coordinated with Mohammed Mokhtar (the former Sudanese Army colonel who served as head of GNPOC security), and wrote detailed reports for senior Talisman officials.[2]

Talisman CEO Buckee was aware of the military's activities from GNPOC airstrips. In February 2001, he wrote to Sudanese Minister of National Defense Major General Bakri Hassan Saleh urging restraint in the Government's military activities and warning that whatever "the military objectives may be, the bombings are [universally construed as violations of international humanitarian law." Greater Nile employees expressed concern to Mokhtar and Government officials about bombers and helicopter gunships using the airstrips.

Notwithstanding occasional breaks, the military continued to use the facilities. After a missile attack on the Heglig facility in August 2001, Buckee dropped

---

[2] Talisman argues that security reports prepared for Greater Nile are inadmissible because of "multiple levels of hearsay lurking" in the documents and the absence of a hearsay exception allowing for their admission. We do not reach this question, because even assuming the reports would be admissible in their entirety, they would not defeat summary judgment.

his objection to the presence of helicopter gunships, and a Greater Nile security officer wrote to the Government emphasizing the need for security at GNPOC's facilities.

E. Buffer Zone Strategy

At the heart of plaintiffs' complaint is the allegation that the Government created a "buffer zone" around GNPOC facilities by clearing the civilian population to secure areas for exploration. Witness testimony and internal Talisman reports show evidence of forced displacement. For example, a 2002 Greater Nile report describing the "buffer zone" around the Heglig camp explained that "[t]he remaining nomads . . . are being 'encouraged' to complete their move through the area as soon as possible. The area within the security ring road while not a sterile area as found on security operations elsewhere . . . is moving in that direction." A 1999 security report stated that "[t]he military strategy, driven it appears by the GNPOC security management, is to create a buffer zone, i.e. an area surrounding both Heglig and Unity camps inside which no local settlements or commerce is allowed."

F. Greater Nile Inquiry into Expanding its Exploration Area

Greater Nile explored options for drilling new wells within GNPOC's concession, but outside the small area secured by the military in which production was ongoing. Greater Nile considered expanding exploration notwithstanding its knowledge of the Government's buffer zone strategy. According

to plaintiffs, decisions about where to explore "were based upon technical analysis of geological formations performed by Talisman employees in Calgary," without regard to the human consequences of expansion.

G. Plaintiffs' Injuries

The individual plaintiffs remaining in the case consist of current or former residents of southern Sudan who were injured or displaced by Government forces in attacks on communities in Blocks 1, 2, and 5A. The plaintiffs were subjected to assaults by foot soldiers, attackers on horseback, gunships, and bombers. They testified at depositions, with varying degrees of certainty, as to whether the attacks were perpetrated by the Government.

The Presbyterian Church of Sudan asserts claims based on the destruction of its churches by the Government. Plaintiffs Rev. James Koung Ninrew, Chief Tunguar Kueigwong Rat, and Chief Gatluak Chiek Jang testified to seeing churches burned in the Government's attacks.

H. Procedural History

In November 2001, the Presbyterian Church of Sudan and four individual plaintiffs purporting to represent a class of thousands of southern Sudanese filed a complaint against Talisman in the United States District Court for the Southern District of New York. Plaintiffs filed an amended complaint in February 2002 naming additional plaintiffs and adding the Government as a defendant. Plaintiffs' amended complaint alleged that Talisman (1) directly

violated, (2) aided and abetted the Government of Sudan in violating, and (3) conspired with the Government of Sudan to violate customary international law related to genocide, torture, war crimes, and crimes against humanity. Plaintiffs subsequently abandoned the claim of direct liability and elected to proceed against Talisman only on the claims of aiding and abetting and conspiracy.

1. Talisman's Motions to Dismiss

The case was initially assigned to Judge Allen Schwartz. In March 2003, Judge Schwartz issued a lengthy decision denying Talisman's motion to dismiss on numerous jurisdictional grounds. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

The case was reassigned to Judge Denise Cote after Judge Schwartz died in March 2003. Plaintiffs filed a Second Amended Class Action Complaint in August 2003, which added plaintiffs. [3]

After the Supreme Court's decision in Sosa, and our decision in *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003), defendants moved for judgment on the pleadings arguing that the decisions changed the landscape for ATS claims and required reconsideration of the conclusions that [i] corporations can be liable for violating the ATS, and

---

[3] On August 27, 2004, after the submission of relevant discovery, the district court again denied a motion to dismiss for lack of personal jurisdiction. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882(DLC), 2004 U.S. Dist. LEXIS 17030, 2004 WL 1920978 (S.D.N.Y. Aug. 27, 2004).

[ii] accessorial liability is recognized under the ATS. By decision dated June 13, 2005, the district court denied Talisman's motion. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005).

Talisman again moved for judgment on the pleadings based on a letter from the United States Attorney, with attachments from the Department of State and Embassy of Canada expressing concern with the litigation. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882(DLC), 2005 U.S. Dist. LEXIS 18399, 2005 WL 2082846, at *1 (S.D.N.Y. Aug. 30, 2005). The Department of State advised that "considerations of international comity and judicial abstention may properly come into play" in view of Canada's objections to the litigation and the United States government's determination that Canadian courts were capable of adjudicating plaintiffs' claims. 2005 U.S. Dist. LEXIS 18399, [WL] at *2. Canada argued that the court's exercise of jurisdiction [i] infringed on its sovereignty, [ii] chilled its ability to use "trade support services as 'both a stick and carrot in support of peace,'" and [iii] violated traditional restraints on the exercise of extraterritorial jurisdiction. 2005 U.S. Dist. LEXIS 18399, [WL] at *1-2.

In August 2005, the district court denied Talisman's motion. 2005 U.S. Dist. LEXIS 18399, [WL] at *9. As to dismissal on comity grounds, the court found an insufficient nexus between Canada's foreign policy and the specific allegations in the complaint because the litigation did not require judging Canada's policy of constructive engagement

with the Sudan, but "merely" judging "whether Talisman acted outside the bounds of customary international law while doing business in Sudan." 2005 U.S. Dist. LEXIS 18399, [WL] at *5-8. The court also observed that Canadian courts are unable to consider civil suits for violations of the law of nations. 2005 U.S. Dist. LEXIS 18399, [WL] at *7.

As to dismissal on political question grounds, the court emphasized that the State Department letter did not explicitly declare that the lawsuit would interfere with United States policy toward the Sudan or Canada, and the court concluded therefore that exercising jurisdiction would not unduly intrude on the authority of the executive branch. [4] 2005 U.S. Dist. LEXIS 18399, [WL] at *8.

---

[4] In 2005, the district court denied two motions for class certification on the ground that plaintiffs failed to satisfy the "predominance requirement." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 482-85 (S.D.N.Y. 2005); *Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 01 Civ. 9882(DLC)*, 2005 U.S. Dist. LEXIS 20414, 2005 WL 2278076, at *1 (S.D.N.Y. Sep. 20, 2005). The court explained that all class members would have to show "that the injuries for which they are claiming damages were actually caused by [a Government campaign in the south]," which would require individual, fact-intensive inquiries, given the numerous factions of rebel groups and the fog of war. *Presbyterian Church of Sudan*, 226 F.R.D. at 482. Moreover, "damages to class members occurred over more than four years, a territory of many hundreds of square miles, . . . [and] through at least 142 separate incidents." *Presbyterian Church of Sudan*, 2005 U.S. Dist. LEXIS 20414, 2005 WL 2278076, at *3.

2. Motions to Amend and for Summary Judgment

In April 2006, plaintiffs filed a Proposed Third Amended Class Action Complaint. Later that month (before the district court ruled on plaintiffs' motion), Talisman moved for summary judgment as to all claims. On September 12, 2006, the district court granted Talisman's motion. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

The district court first considered whether international law recognized conspiracy liability. The court held that "the offense of conspiracy is limited to conspiracies to commit genocide and to wage aggressive war" and that international law does not recognize the doctrine of liability articulated in *Pinkerton v. United States*, 328 U.S. 640, 646-47, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946). *Presbyterian Church of Sudan*, 453 F. Supp. 2d at 663, 665. The court observed that plaintiffs never brought a claim for "wag[ing] aggressive war" and that they had abandoned their genocide claim. *Id. at 665*. Nonetheless, the court addressed the genocide claim and held that plaintiffs could not be made liable for a co-conspirator's conduct solely because that conduct was foreseeable. *Id.*

The district court next considered plaintiffs' claim that Talisman aided and abetted genocide, war crimes, and crimes against humanity. The court undertook to define the elements of aiding and abetting liability under the ATS, and concluded that they must be derived from international law. The court comprehensively surveyed international law

and held that:

> To show that a defendant aided and abetted a violation of international law, an ATS plaintiff must show:
>
> > 1) that the principal violated international law;
> >
> > 2) that the defendant knew of the specific violation;
> >
> > 3) that the defendant acted with the intent to assist that violation, that is, the defendant specifically directed his acts to assist in the specific violation;
> >
> > 4) that the defendant's acts had a substantial effect upon the success of the criminal venture; and
> >
> > 5) that the defendant was aware that the acts assisted the specific violation.

Id. at 668.

As to plaintiffs' genocide claim, the court held that whether or not genocide was taking place, plaintiffs had presented no evidence that Talisman was aware of the genocide, or, if it was, that Talisman intended to further it. *Id.* at 669-70.

As to war crimes and crimes against humanity, the court identified the kinds of "substantial

assistance" that Talisman allegedly provided in aid of these violations: "(1) upgrading the Heglig and Unity airstrips; (2) designating areas 'south of the river' in Block 4 for oil exploration; (3) providing financial assistance to the Government through the payment of royalties; (4) giving general logistical support to the Sudanese military; and (5) various other acts." *Id.* at 671-72.

The court determined that the airstrips at Unity and Heglig were owned and operated by GNPOC--not Talisman--and that there was no evidence that Talisman upgraded or improved the airstrips. *Id.* at 673. Moreover, even if plaintiffs could show that Talisman was involved, there is no evidence that it upgraded the airstrips with the intention that the Government would use them for missions that violate human rights. *Id.* at 674.

As to designating areas "south of the river" for exploration, the court determined that preliminary discussions about expanding operations did not violate international humanitarian law and that there was no evidence Talisman was involved in such discussions, let alone that it considered the expansion as a pretext for attacking civilians. *Id.* at 675.

As to Talisman's payment of royalties to the Government, the court found no admissible evidence of the relationship between oil profits and military spending. *Id.* Nonetheless, the court assumed the relationship, and held that such payments were not enough to establish liability in the absence of evidence that Talisman "specifically directed" payments to military procurement or that it intended to aid attacks. *Id.* at 676.

As to the construction of all-weather roads and the provision of fuel to the military, the court concluded that the assistance was provided by GNPOC, not Talisman, which had a limited presence on the ground. *Id.* at 676-77.

Finally, the court addressed plaintiffs' allegations that Talisman assisted the Government by "using its community development program as a cover for gathering military intelligence" and by publicly denying knowledge of human rights violations. The court ruled that there was no admissible evidence of the former allegation, and concluded that the latter did not constitute "substantial assistance" in violation of international humanitarian law. *Id.* at 677.

Although not necessary for deciding Talisman's motion, the court ruled on whether plaintiffs could show that their injuries were caused by attacks initiated from GNPOC airfields, finding that only three plaintiffs were "arguably" attacked with GNPOC assistance, *id.* at 677, and that there was an absence of admissible evidence as to which Government aircraft flew particular missions, *id.* at 678.

Further, plaintiffs' motion to amend the complaint was denied on the ground that plaintiffs could not show good cause to amend three years after the deadline for amendment set forth in the scheduling order. *Id.* at 680. The court went on, however, to discuss the merits of the amended complaint and whether it could survive a motion for summary judgment (given that the discovery period had closed). The court conducted a comprehensive choice of law analysis, and concluded that [i] there was no

basis for applying domestic federal law to plaintiffs' claims against foreign corporations, *id.* at 681-83, and [ii] plaintiffs could not pierce the corporate veils of Talisman's subsidiaries or hold GNPOC or the subsidiaries liable on theories of joint venture or agency, *id.* at 683-89.

Having prevailed on summary judgment, Talisman moved for partial judgment pursuant to Federal Rule of Civil Procedure 54(b), so that it could achieve finality in the case notwithstanding the Government's failure to enter an appearance. The district court granted Talisman's motion and entered judgment in favor of Talisman. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882(DLC), 2006 U.S. Dist. LEXIS 86609, 2006 WL 3469542, at *2 (S.D.N.Y. Dec. 1, 2006). This appeal followed.

DISCUSSION

Plaintiffs argue that, in granting summary judgment, the district court drew inferences in favor of Talisman, excluded plaintiffs' evidence from consideration, and failed to hold Talisman responsible for human rights abuses committed by its partners and agents. This Court "review[s] de novo the district court's grant of summary judgment, drawing all factual inferences in favor of the non-moving party." *Paneccasio v. Unisource Worldwide, Inc.*, 532 F.3d 101, 107 (2d Cir. 2008).

I

The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law

of nations or a treaty of the United States." 28 U.S.C. § 1350. Although the statute was passed as part of the Judiciary Act of 1789, it provided jurisdiction in only one case in its first 170 years. *Sosa*, 542 U.S. at 712. Invocation of the statute became more frequent after the issuance of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which held "that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties," and that the ATS "provides federal jurisdiction" over torture claims. *Id.* at 878. The torturer was likened to the pirate and slave trader of old, "an enemy of all mankind." *Id.* at 890.

Filartiga held "that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Id.* at 881. At the same time, *Filartiga* cautioned restraint: "[t]he requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one." *Id.* "It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute." *Id.* at 888.

In *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), we concluded "that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." *Id.* at 239. *Kadic* recognized that claims

for genocide and war crimes against individuals could proceed without state action. *Id.* at 244.

In *Flores*, we surveyed the state of ATS case law and engaged in a detailed analysis of the ATS and related principles of international law. *Flores* distilled three elements required to state a claim under the ATS: "plaintiffs must (i) be 'aliens,' (ii) claiming damages for a 'tort only,' (iii) resulting from a violation 'of the law of nations' or of 'a treaty of the United States.'" 414 F.3d at 242 (quoting 28 U.S.C. § 1350). We again issued a caution: "in determining what offenses violate customary international law, courts must proceed with extraordinary care and restraint." *Id.* at 248. The decisive issue in this case is whether accessorial liability can be imposed absent a showing of purpose. To answer this question "'we look primarily to the formal lawmaking and official actions of States and only secondarily to the works of scholars as evidence of the established practices of States.'"[5] *Id.* at 250 (quoting *United States v. Yousef*,

---

[5] *Flores* cited Article 38 of the Statute of the International Court of Justice, which provides that courts should look to the following sources of international law:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the

327 F.3d 56, 103 (2d Cir. 2003)). After a thorough review of these sources, *Flores* concluded that the alleged prohibition on "*intra*national pollution" and "rights to life and health [were] insufficiently definite to constitute rules of customary international law." *Id.* at 254-55.

The United States Supreme Court has analyzed the ATS only once. In *Sosa*, the Court explained that the ATS "was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject," 542 U.S. at 714, and that "[t]he jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time," *id.* at 724. Claims "based on the present-day law of nations" should be recognized only if "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" contemporary with enactment of the ATS. *Id.* at 725.

Sosa cited five reasons for courts to exercise "great caution" before recognizing violations of international law that were not recognized in 1789:

> most highly qualified publicists [i.e., scholars or "jurists"] of the various nations, as subsidiary means for the determination of rules of law.

414 F.3d at 251 (italics omitted) (quoting Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 33 U.N.T.S. 993).

> First, . . . the [modern] understanding that the law is not so much found or discovered as it is either made or created[;] . . . [s]econd, . . . an equally significant rethinking of the role of the federal courts in making it[;] . . . [t]hird, [the modern view that] a decision to create a private right of action is one better left to legislative judgment in the great majority of cases[;] . . . [f]ourth . . . risks of adverse foreign policy consequences[; and] . . . fifth[,] . . . the lack of a] congressional mandate to seek out and define new and debatable violations of the law of nations.

Id. at 725-28. Thus, under *Sosa*, "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Id.* at 732-33.

We have applied *Sosa* in four opinions addressing ATS claims. In three of them, we considered whether *Sosa* permitted recognition of particular offenses. In *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104 (2d Cir. 2008), we held that the manufacture and supply of an herbicide used as a defoliant (with collateral damage) did not violate international law: "[i]nasmuch as Agent Orange was intended for defoliation and for destruction of crops only, its use did not violate . . . international norms . . . , since those norms would not necessarily prohibit the deployment of materials that are only

secondarily, and not intentionally, harmful to humans." *Id.* at 119-20.

Mora v. New York, 524 F.3d 183 (2d Cir. 2008), held that detention without notice of consular rights (in violation of Article 36(1)(b)(third) of the Vienna Convention on Consular Relations) did not violate a "well-accepted" international law norm. *Id.* at 208-09. But a divided panel held in *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009), "that the prohibition in customary international law against nonconsensual human medical experimentation can[] be enforced through the ATS." *Id.* at 169.

In the fourth case--*Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007)--we ruled in a per curiam opinion that "in this Circuit, a plaintiff may plead a theory of aiding and abetting liability under the [ATS]." *Id.* at 260.

II

Plaintiffs assert that Talisman aided and abetted (and conspired with) the Government in the commission of three violations of international law: [i] genocide, [ii] war crimes, and [iii] crimes against humanity. All three torts may be asserted under the ATS. *Kadic*, 70 F.3d at 236 ("[W]e hold that subject-matter jurisdiction exists[, and] that [defendant] may be found liable for genocide, war crimes, and crimes against humanity . . . ."); see also *Sosa*, 542 U.S. at 762 (Breyer, J., concurring in part and concurring in judgment) (describing a "subset" of "universally condemned behavior" for which "universal jurisdiction exists," including "torture, genocide, crimes against humanity, and war crimes"); *Flores*,

414 F.3d at 244 n.18 ("Customary international law rules proscribing crimes against humanity, including genocide, and war crimes, have been enforceable against individuals since World War II.").

In *Kadic*, we defined "genocide" and "war crimes." *Kadic* adopted the definition of genocide from the Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 ("Genocide Convention"), which defines genocide as:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births with the group;
>
> (e) Forcibly transferring children of the group to another group.

Kadic, 70 F.3d at 241 (quoting Genocide Convention).

As to war crimes, *Kadic* applied the definition from Common Article 3 of the Geneva Convention, which "applies to 'armed conflict[s] not of an

international character'" and requires "'each Party to the conflict'" to adhere to the following:

> Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> > (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> >
> > (b) taking of hostages;
> >
> > (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> >
> > (d) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court . . . .

Kadic, 70 F.3d at 243 (alterations in original) (quoting Convention Relative to the Protection of Civilian Persons in Time of War art. 3, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287). This standard

applies to "all 'parties' to a conflict--which includes insurgent military groups." *Id.*

We have never defined "crimes against humanity." Here, the district court adopted a generally serviceable definition, which the parties do not challenge and which we therefore, for purposes of this case, need not evaluate or edit: "[c]rimes against humanity include murder, enslavement, deportation or forcible transfer, torture, rape or other inhumane acts, committed as part of a widespread [or] systematic attack directed against a civilian population." [6] *Presbyterian Church of Sudan,* 453 F. Supp. 2d at 670.

Talisman does not contest that the enumerated torts are cognizable under the ATS. At issue is whether plaintiffs' claim that Talisman aided and abetted these offenses (and conspired to do them) is actionable under the ATS absent evidence that Talisman acted with the purpose of advancing the abuses, and, if proof of purpose is an element, whether the evidence supports such a finding.

III

There is no allegation that Talisman (or its employees) personally engaged in human rights abuses; the allegation is that Talisman was complicit in the Government's abuses.

---

[6] The district court used the phrase "widespread and systematic," but plaintiffs argue that this was error, and that "and" should be replaced by "or." (Pls.' Br. 65). We assume for purposes of this appeal that plaintiffs' formulation is correct.

That allegation places in issue the standard for aiding and abetting liability under the ATS. [7] This question was presented to a prior panel, which held, in a brief per curiam opinion, that "in this Circuit, a plaintiff may plead a theory of aiding and abetting liability under the [ATS]." *Khulumani*, 504 F.3d at 260. However, the panel fractured as to the standard for pleading such liability.

Judge Katzmann, concurring, was of the view "that a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime." *Id.* at 277 (Katzmann, J., concurring). Judge Korman noted that (were he not dissenting on other grounds) he would have concurred with Judge Katzmann. *Id.* at 333 (Korman, J., concurring in part and dissenting in part). Both judges observed that the standard for aiding and abetting liability under the ATS must derive from international law sources. *Id.* at 268

---

[7] We address aiding and abetting liability--a concept typically associated with the criminal law--because customary international law norms prohibiting genocide, war crimes, and crimes against humanity have "been developed largely in the context of criminal prosecutions rather than civil proceedings." *John Doe I v. Unocal Corp.*, 395 F.3d 932, 949 (9th Cir. 2002); *see also Khulumani*, 504 F.3d at 270 n.5 (Katzmann, J., concurring) ("[O]ur case law . . . has consistently relied on criminal law norms in establishing the content of customary international law for purposes of the [ATS].").

(Katzmann, J., concurring); *id.* at 331 (Korman, J., concurring in part and dissenting in part).

Judge Hall's closely reasoned concurring opinion concluded that *Sosa*'s reliance on international law applied to the question of recognizing substantive offenses, but not to the issue of secondary liability. On that issue, he found that "*Sosa* at best lends Delphian guidance," largely in dicta. *Id.* at 286 (Hall, J., concurring). Citing "a hornbook principle that international law does not specify the means of its domestic enforcement," *id.* (internal quotation marks omitted), Judge Hall turned to the *Restatement (Second) of Torts § 876(b)*, which states that the aiding and abetting standard should be [i] knowing [ii] encouragement [iii] that facilitated the substantive violation. *Id.* at 287-89.

The upshot of this split is that notwithstanding the agreement of two judges, Judge Katzmann's view did not constitute a holding and is therefore not binding precedent. In this unusual circumstance, the issue remains live. This opinion draws substantially from Judge Katzmann's concurring opinion, and adopts his proposed rule as the law of this Circuit.

Judge Katzmann began by choosing the source of law that should provide the basis for an aiding and abetting standard.[8] He observed that this Court has

---

[8] Judge Katzmann's individual opinion contains a thorough discussion of aiding and abetting principles. This opinion sets forth only so much of Judge Katzmann's analysis as is necessary to provide the context of our holding. For an extended discussion of the aiding and abetting issue, *see Khulumani*, 504 F.3d at 268-77 (Katzmann, J., concurring).

"repeatedly emphasized that the scope of the [ATS's] jurisdictional grant should be determined by reference to international law." *Id.* at 269 (Katzmann, J., concurring) (citing *Kadic*, 70 F.3d at 238; *Flores*, 414 F.3d at 248; *Filartiga*, 630 F.2d at 887). Similarly, footnote 20 of *Sosa*,[9] while nominally concerned with the liability of non-state actors, supports the broader principle that the scope of liability for ATS violations should be derived from international law. *Id.*

Judge Katzmann concluded that, while domestic law might provide guidance on whether to recognize a violation of international norms, it cannot render conduct actionable under the ATS. *Id.* at 270.

Judge Katzmann's research "revealed no source of international law that recognizes liability for aiding and abetting a violation of international law but would not authorize the imposition of such liability on a party who acts with the purpose of facilitating that violation (provided, of course, that the *actus reus* requirement is also satisfied)." *Id.* at 277. While liability had been imposed in certain cases under a less-stringent knowledge standard, *see, e.g., id.* at 277 n.12 (citing *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Appeal Judgment, P 102(ii) (Feb. 24, 2004)), Judge Katzmann cited *Sosa*'s requirement that a norm obtain universal acceptance, and adopted the

---

[9] A consideration related to whether the ATS provides jurisdiction over a norm is "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 n.20.

standard set forth in the Rome Statute: "that a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime." *Id.* at 277.

We agree that *Sosa* and our precedents send us to international law to find the standard for accessorial liability. Plaintiffs argue that aiding and abetting liability is a matter ordinarily left to the forum country, where (in this venue) the principle is broad and elastic. But such an expansion would violate *Sosa's* command that we limit liability to "violations of . . . international law . . . with . . . definite content and acceptance among civilized nations [equivalent to] the historical paradigms familiar when § 1350 was enacted." 542 U.S. at 732. Recognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place.

Thus, applying international law, we hold that the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone. Even if there is a sufficient international consensus for imposing liability on individuals who *purposefully* aid and abet a violation of international law, *see Khulumani*, 504 F.3d at 276 (Katzmann, J., concurring); cf. *id.* at 333 (Korman, J., concurring in part and dissenting in part), no such consensus exists for imposing liability on individuals who *knowingly*

(but not purposefully) aid and abet a violation of international law.

Indeed, international law at the time of the Nuremberg trials recognized aiding and abetting liability only for purposeful conduct. *See United States v. von Weizsaecker* (The Ministries Case), *in* 14 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, at 662 (William S. Hein & Co., Inc. 1997) (1949) (declining to impose criminal liability on a bank officer who made a loan with the knowledge, but not the purpose, that the borrower would use the funds to commit a crime). That purpose standard has been largely upheld in the modern era, with only sporadic forays in the direction of a knowledge standard. *See Khulumani*, 504 F.3d at 276 (Katzmann, J., concurring) (noting that some international criminal tribunals have made overtures toward a knowledge standard but that the Rome Statute of the International Criminal Court adopts a purpose standard); *see also id.* at 332-37 (Korman, J., concurring in part and dissenting in part). Only a purpose standard, therefore, has the requisite "acceptance among civilized nations," *Sosa*, 542 U.S. at 732, for application in an action under the ATS. *See generally Flores*, 414 F.3d at 248 ("[I]n order for a principle to become part of customary international law, States must universally abide by it."); *see also Yousef*, 327 F.3d at 92, 105-08; *Kadic*, 70 F.3d at 239; *Filartiga*, 630 F.2d at 888.

IV

Plaintiffs allege that Talisman conspired with the Government to commit human rights abuses and argue that the district court failed to apply conspiracy principles from United States law to violations of international law under the ATS. In particular, plaintiffs urge application of the *Pinkerton* doctrine, 328 U.S. at 646-47.[10] Whether conspiracy claims are cognizable under international law is a question of first impression in this Circuit.

As a matter of first principles, we look to international law to derive the elements for any such cause of action.[11] *See* Sec. III, *supra*. In so doing, we must distinguish between the inchoate crime of

---

[10] "[U]nder *Pinkerton*, a defendant may be found 'guilty on a substantive count without specific evidence that he committed the act charged if it is clear that the offense had been committed, that it had been committed in the furtherance of an unlawful conspiracy, and that the defendant was a member of that conspiracy.'" *United States v. Bruno*, 383 F.3d 65, 89 (2d Cir. 2004) (quoting *United States v. Miley*, 513 F.2d 1191, 1208 (2d Cir. 1975)).

[11] Plaintiffs argue that federal conspiracy law should apply to ATS claims. *See, e.g., Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (applying domestic law to ATS conspiracy claim). Judge Cote rejected that approach, holding that *Sosa* required applying international law. *Presbyterian Church*, 453 F. Supp. 2d at 665 n.64. We agree with Judge Cote. Moreover, plaintiffs would fare no better if we adopted their preferred definition of conspiracy, because that definition (derived from domestic law) also requires proof "that . . . [the defendant] joined the conspiracy *knowing of at least one of the goals of the conspiracy and intending to help accomplish it.*" *Cabello*, 402 F.3d at 1159 (emphasis added).

conspiracy (which requires an agreement and overt acts, but no completed deed) and conspiracy as a theory of accessorial liability for completed offenses.

As to conspiracy as an inchoate offense, the Supreme Court held in *Hamdan v. Rumsfeld,* 548 U.S. 557, 610, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006), that "the only 'conspiracy' crimes that have been recognized by international war crimes tribunals (whose jurisdiction often extends beyond war crimes proper to crimes against humanity and crimes against the peace) are conspiracy to commit genocide and common plan to wage aggressive war." Plaintiffs did not plead the waging of aggressive war, and while they did plead genocide, it is pled as a completed offense, not an inchoate one.

The analog to a conspiracy as a completed offense in international law is the concept of a "joint criminal enterprise." *See Hamdan,* 548 U.S. at 611 n.40. Even assuming, without deciding, that plaintiffs could assert such a theory in an ATS action, an essential element of a joint criminal enterprise is "a criminal intention to participate in a common criminal design." *Prosecutor v. Tadic,* Case No. IT-94-1-A, Appeal Judgment, P 206 (July 15, 1999) (basing that finding on numerous precedents from criminal tribunals established in the aftermath of Word War II). Therefore, under a theory of relief based on a joint criminal enterprise, plaintiffs' conspiracy claims would require the same proof of *mens rea* as their claims for aiding and abetting.

In any event, plaintiffs have not established that "international law [universally] recognize[s] a doctrine of conspiratorial liability that would extend

to activity encompassed by the *Pinkerton* doctrine." *Presbyterian Church of Sudan,* 453 F. Supp. 2d at 663.

V

Therefore, in reviewing the district court's grant of summary judgment to Talisman, we must test plaintiffs' evidence to see if it supports an inference that Talisman acted with the "purpose" to advance the Government's human rights abuses.

The district court's observations are well considered and apt. "The activities which the plaintiffs identify as assisting the Government in committing crimes against humanity and war crimes generally accompany any natural resource development business or the creation of any industry." *Presbyterian Church of Sudan,* 453 F. Supp. 2d at 672. None of the acts was inherently criminal or wrongful. "[T]he plaintiffs' theories of substantial assistance serve essentially as proxies for their contention that Talisman should not have made any investment in the Sudan, knowing as it did that the Government was engaged in the forced eviction of non-Muslim Africans from lands that held promise for the discovery of oil." *Id.* In sum:

> The plaintiffs essentially argue that Talisman understood that the Government had cleared and would continue to clear the land of the local population if oil companies were willing to come to the Sudan and explore for oil, and that[,] understanding that to be so, Talisman should not have come. They

> have no evidence that Talisman (or [Greater Nile] or GNPOC) participated in any attack against a plaintiff and no direct evidence of Talisman's illicit intent, so they wish to argue that Talisman's knowledge of the Government's record of human rights violations, and its understanding of how the Government would abuse the presence of Talisman, is a sufficient basis from which to infer Talisman's illicit intent when it designated areas for exploration, upgraded airstrips or paid royalties.

Id. at 672-73.

Plaintiffs argue that the district court's analysis was flawed because it assumed that "ordinary development activities cannot constitute aiding and abetting." This argument misconstrues the district court's analysis, which does not rely on any categorical or blanket principle precluding liability; rather, the court conscientiously looked at each specific activity to determine if it satisfied the aiding and abetting standard. A *de novo* review of plaintiffs' evidence confirms the soundness of the district court's ruling.

As a threshold matter, Talisman did not manage oil operations in the Sudan: its indirect subsidiary Greater Nile was a 25% shareholder in GNPOC, the corporation responsible for developing the concessions. The rest of the GNPOC shares were held by entities from China, Malaysia, and the Sudan. This attenuation between the plaintiffs' allegations

and the named defendant (the only entity over which the district court had personal jurisdiction) raises knotty issues concerning control, imputation, and veil piercing (among other things). Nevertheless, we will assume for most purposes that plaintiffs could surmount these hurdles;[12] so we proceed to the allegations of aiding and abetting and conspiring to commit human rights abuses.

The district court classified four kinds of "substantial assistance" that Talisman provided (or is alleged to have provided) to the Government: "(1) upgrading the Heglig and Unity airstrips; (2) designating areas 'south of the river' in Block 4 for oil exploration; (3) providing financial assistance to the Government through the payment of royalties; [and] (4) giving general logistical support to the Sudanese military."[13] *Presbyterian Church of Sudan*, 453 F. Supp. 2d at 671-72. We take these up one by one.

---

[12] We will also assume, without deciding, that corporations such as Talisman may be held liable for the violations of customary international law that plaintiffs allege. Because we hold that plaintiffs' claims fail on other grounds, we need not reach, in this action, the question of "whether international law extends the scope of liability" to corporations. *Sosa*, 542 U.S. at 732 n.20.

[13] The district court also addressed plaintiffs' allegations that Talisman assisted the Government by "using its community development program as a cover for gathering military intelligence" and by publicly denying knowledge of human rights violations. *Presbyterian Church of Sudan*, 453 F. Supp. 2d at 677. Plaintiffs do not raise the former point on appeal and we agree with the district court that publicly denying knowledge of abuses is not "substantial assistance."

1. Talisman helped build all-weather roads and improved airports, notwithstanding awareness that this infrastructure might be used for attacks on civilians. There is no doubt that roads and airports are necessary features of a remote facility for oil extraction: they are used for transporting supplies, bringing workers to the work site, and assuring evacuation in the event of emergency.

There is evidence that Talisman (partially) financed the road-building, from its Calgary headquarters, and helped build other infrastructure, notwithstanding awareness of the Government's activity. But obviously there are benign and constructive purposes for these projects, and (more to the point) there is no evidence that any of this was done for an improper purpose. Consistent with plaintiffs' effort to show that GNPOC personnel had knowledge of the Government's human rights abuses, plaintiffs adduce evidence that senior Talisman officials protested to the Government and that security reports shared with senior Talisman officials expressed concern about the military's use of GNPOC airstrips. Since, however, the proper test of liability is purpose (not knowledge), all this evidence of knowledge (and protest) cuts against Talisman's liability.

Even if Talisman built roads or improved the airstrips with the intention that the military would also be accommodated, GNPOC had a legitimate need to rely on the military for defense. It is undisputed that oil workers in that tumultuous region were subjected to attacks: rebel groups viewed oil installations and oil workers as enemy targets; an e-

mail from a Talisman employee describes rebel attacks and the placement of mines in work areas; rebels launched a nighttime mortar attack against a Heglig camp where 700 oil workers were living; and in Block 5A the attacks caused that concessionaire (Lundin Oil AB) to close down operations for an extended period. In these circumstances, evidence that GNPOC was coordinating with the military supports no inference of a purpose to aid atrocities.

2. At one point, Greater Nile was worried that the Government would terminate GNPOC's concession on lands south of its existing operations unless GNPOC began to exploit them, and consideration was given to an expansion. Plaintiffs contend that this consideration violated international law. However, the evidence shows that this expansion south did not occur during the time any Talisman affiliate was in the Sudan, and contemplation does not amount to "substantial assistance" in violation of international law.

3. The royalties paid by GNPOC may have assisted the Government in its abuses, as it may have assisted any other activity the Government wanted to pursue. But there is no evidence that GNPOC or Talisman acted with the purpose that the royalty payments be used for human rights abuses.

4. GNPOC provided fuel for military aircraft taking off on bombing missions, and some of the fuel was paid for by GNPOC rather than the Government. This evidence is insufficient to defeat summary judgment for two reasons. First, there is no showing that Talisman was involved in such routine day-to-day GNPOC operations as refueling aircraft. Second,

there is no evidence that GNPOC workers provided fuel for the purpose of facilitating attacks on civilians; to the contrary, an e-mail from a Talisman employee to his supervisor, which plaintiffs use to show that the military refueled at a GNPOC airstrip, expresses anger and frustration at the military using the fuel.

Plaintiffs' primary argument is that Talisman supported the creation of a buffer zone around its oil fields, understanding that the Government was displacing huge numbers of civilians from oil-rich regions, decimating as it went the population of southern Sudan. As evidence, plaintiffs cite statements in Greater Nile security memoranda, including this one: "[t]he military strategy, driven it appears by the GNPOC security management, is to create a buffer zone, i.e., an area surrounding both Heglig and Unity camps inside which no local settlements or commerce is allowed." [14]

Plaintiffs repeatedly cite the forced displacement of people from the oil fields, but they do not allege that such displacement in itself is a violation of international law. That is understandable, because a government has power to regulate use of land and resources. Resource extraction in particular is by nature land-intensive: land is needed for exploration and engineering, equipment, rigs or mines, offices and dormitories in remote areas, transportation infrastructure, and so on. Under the best

---

[14] Talisman argues that this statement (and others cited by plaintiffs) references an area of 5km and 8km around the Heglig and Unity camps,] respectively, not a zone covering the entirety of the concession area.

circumstances, these facilities might require relocation from a development area. But GNPOC was not operating in the best of circumstances. Sudan's oil was located in an area heavily contested in a civil war, in a region of the country that had suffered through four decades of violence before Talisman arrived. The oil facilities came under frequent rebel attack and oil workers were killed during the relevant time. Safe operation of the oil facilities therefore required tightened security; and displacing civilians from an "area within the security ring road" was not in itself unlawful.

It is therefore not enough for plaintiffs to establish Talisman's complicity in depopulating areas in or around the Heglig and Unity camps: plaintiffs must establish that Talisman acted with the purpose to assist the Government's violations of customary international law.

Plaintiffs have provided evidence that the Government violated customary international law; but they provide no evidence that Talisman acted with the purpose to support the Government's offenses. Plaintiffs do not suggest in their briefs that Talisman was a partisan in regional, religious, or ethnic hostilities, or that Talisman acted with the purpose to assist persecution. To the contrary, the actions of the Sudanese government threatened the security of the company's operations, tarnished its reputation, angered its employees and management, and ultimately forced Talisman to abandon the venture.

Plaintiffs argue that they need no direct evidence of purpose because "'[genocidal intent may] be

inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.'" *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 479 (S.D.N.Y. 2005) (alterations in original) (quoting *Prosecutor v. Jelisec*, No. IT-95-10-A, Appeals Chamber Judgment, P 101 (July 5, 2001)). True, intent must often be demonstrated by the circumstances, and there may well be an ATS case in which a genuine issue of fact as to a defendant's intent to aid and abet the principal could be inferred; but in this case, there were insufficient facts or circumstances suggesting that Talisman acted with the purpose to advance violations of international humanitarian law.

The reports that plaintiffs rely upon to prove knowledge also show that Greater Nile security personnel and GNPOC workers were upset by the Government's actions and possible attacks on civilians. For example, several reports address the company's efforts to relieve the plight of internally displaced persons, which included stockpiling tons of relief supplies and distributing food, water, medicine, and mosquito nets.

There is evidence that southern Sudanese were subjected to attacks by the Government, that those attacks facilitated the oil enterprise, and that the Government's stream of oil revenue enhanced the military capabilities used to persecute its enemies.

But if ATS liability could be established by knowledge of those abuses coupled only with such commercial activities as resource development, the statute would act as a vehicle for private parties to impose embargos or international sanctions through civil actions in United States courts. Such measures are not the province of private parties but are, instead, properly reserved to governments and multinational organizations.

VI

Plaintiffs argue that the district court failed to consider portions of the summary judgment record and failed to afford the parties an opportunity to argue evidentiary issues. We reject these contentions. The district court did not make a "wholesale blanket ruling" excluding plaintiffs' evidence and did not exclude evidence in contravention of the Federal Rules of Evidence. Moreover, plaintiffs have cited no relevant authority holding that a district court is confined to a particular evidentiary procedure in ruling on a summary judgment motion.

A district court deciding a summary judgment motion "has broad discretion in choosing whether to admit evidence." *Raskin v. Wyatt Co.*, 125 F.3d 55, 65 (2d Cir. 1997). "The principles governing admissibility of evidence do not change on a motion for summary judgment." *Id.* at 65-66. "Rule 56(e) provides that affidavits in support of and against summary judgment shall set forth such facts as would be *admissible in evidence*. Therefore, only admissible evidence need be considered by the trial court in ruling on a motion for summary judgment."

Id. at 66 (internal quotation marks and citations omitted). It is difficult to see how a court can decide a summary judgment motion without deciding questions of evidence:

> Because the purpose of summary judgment is to weed out cases in which "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," it is appropriate for district courts to decide questions regarding the admissibility of evidence on summary judgment. Although disputes as to the validity of the underlying data go to the weight of the evidence, and are for the fact-finder to resolve, questions of admissibility are properly resolved by the court. The resolution of evidentiary questions on summary judgment conserves the resources of the parties, the court, and the jury.

Id. (citations omitted) (alterations in original); *see also LaSalle Bank Nat. Ass'n v. Nomura Asset Capital Corp.*, 424 F.3d 195, 205-06 (2d Cir. 2005) ("Even on summary judgment, a district court has wide discretion in determining which evidence is admissible, [and] we review its evidentiary rulings for manifest error." (internal quotation marks and citations omitted) (alterations in original)).

At the outset of the summary judgment opinion in this case, the district court observed that

> Plaintiffs have not distinguished between the admissible and inadmissible. The plaintiffs repeatedly describe "Talisman" as having done this or that, when the examination of the sources to which they refer reveals that it is some other entity or an employee of some other company that acted. They assert that this or that event happened, when the documents to which they refer consist of hearsay embedded in more hearsay. Indeed, most of the admissible evidence is either statements made by or to Talisman executives, and the plaintiffs' descriptions of their own injuries, with very little admissible evidence offered to build the links in the chain of causation between the defendant and those injuries.

Presbyterian Church of Sudan, 453 F. Supp. 2d at 639. Plaintiffs argue that this prefatory language amounts to an evidentiary ruling and bespeaks a disregard of the plaintiffs' evidence in whole. However, the district court set aside its concerns about the evidence in describing the facts of the case: "In order to describe as fairly as possible the evidence the plaintiffs present, the description of events that follows is largely taken from the documents on which the plaintiffs have placed the greatest reliance, without a careful analysis of the admissibility of this evidence." *Id.* at 641-42.

In weighing evidence of questionable admissibility, the district court often noted Talisman's evidentiary objection, and sometimes

expressed a view of the objection; but the court never made a blanket exclusion of evidence.

Plaintiffs focus on four specific "exclusions":

1. Congressional findings included in the Sudan Peace Act stating that genocide was taking place in the Sudan and that oil profits were contributing to the misery. *See* Pub. L. No. 107-245, 116 Stat. 1504 (2002) (codified at 50 U.S.C. § 1701 note). This was not excluded; the court described the congressional findings and Talisman's objections, and explained that in any case plaintiffs had no proof of Talisman's intent. *Presbyterian Church of Sudan,* 453 F. Supp. 2d at 669-70.

2. Evidence from plaintiffs' experts about the relationship between oil profits and military spending. The district court conceded that "plaintiffs have evidence from which a jury could find that Talisman believed that the Government used oil revenues to buy armaments, even if Talisman did not have any direct evidence or knowledge of that fact." *Id.* at 676. The district court nonetheless concluded that was not enough, because plaintiffs had not "identified evidence sufficient to support a finding that when Talisman (or [Greater Nile] or GNPOC) paid royalties, it 'specifically directed' those payments to the Government's procurement of weaponry to target civilians and displace them." *Id.*

3. Security reports by Greater Nile personnel (who monitored threats to GNPOC workers) recording the military's use of airstrips to conduct bombing runs and other military operations. The district court described these reports in great detail in the background section of its opinion, and

explained that the reports painted a complex picture of the situation. Whatever the significance of the information in the reports, there is no question that they were accounted for in the district court's analysis.

4. A declaration from the head of security for Arakis (Robert Norton), stating that he had warned Talisman at the time it purchased Arakis about likely civilian displacement. The district court excluded this declaration because the witness had testified at an earlier deposition that he was unaware of any displacement. *Presbyterian Church of Sudan,* 453 F. Supp. 2d at 647 & n.11. The district court explained "[a] witness may not use a later affidavit to contradict deposition testimony in an effort to defeat a motion for summary judgment." *Presbyterian Church of Sudan,* 453 F. Supp. 2d at 647 (citing *Bickerstaff v. Vassar Coll.,* 196 F.3d 435, 455 (2d Cir. 1999)). Plaintiffs contend that only declarations from parties contradicting earlier deposition testimony are inadmissible, and that Norton's declaration did not fit within this rule. We need not decide this question, because [i] there was other evidence of Talisman's knowledge of displacement of civilians and [ii] Talisman's notice of this displacement is not enough to show an illicit purpose.

Plaintiffs cite *United States v. McDermott,* 245 F.3d 133 (2d Cir. 2001), and *United States v. Carson,* 52 F.3d 1173 (2d Cir. 1995), for the proposition that a party must make a specific and contemporaneous objection to the admission of trial evidence under Federal Rule of Evidence 103(a)(1). This non-controversial proposition is irrelevant, because the

case never went to trial and because Talisman is not objecting to the district court's admission of trial evidence.

Finally, plaintiffs rely on an unpublished opinion from the Eleventh Circuit which reversed a district court's striking of fifty passages from a response to a motion for summary judgment. *Mack v. ST Mobile Aerospace Eng'g, Inc.*, 195 F. App'x 829 (11th Cir. 2006). The district court in that case: [i] failed to give the parties an opportunity to argue the merits of the objections; [ii] failed to analyze and rule on each objection; and [iii] offered only a "blanket declaration that 'the statements at issue are inadmissible hearsay, double hearsay, opinion, speculation and/or conjecture.'" *Id.* at 842-43. Moreover, nothing in the submission could be "inadmissible hearsay evidence because the passages [were] not evidence at all--they [were] the plaintiffs' *arguments* in their responsive pleading." *Id.* at 842 (emphasis in original). *Mack* is easily distinguishable. First, the district court in this case explained its reasons for excludingevidence. Second, the district court in *Mack* struck pleadings, not evidence. Third, the Eleventh Circuit reversed in part because it determined (after addressing several specific strikes) that the district court's evidentiary rulings were wrong on the merits. Plaintiffs have pointed to no incorrect rulings in this case (with the possible exception of the Norton declaration, which is not material as to purpose). [15]

---

[15] Plaintiffs also rely on *Halbrook v. Reichhold Chemicals, Inc.*, 735 F. Supp. 121, 128 (S.D.N.Y. 1990), in which the district court denied summary judgment on a sexual harassment claim. *Halbrook* is inapposite because the court in that case deferred

In conclusion, there is no evidence that the district court improperly failed to consider plaintiffs' evidence.

VII

Two weeks before Talisman moved for summary judgment, plaintiffs filed a Proposed Third Amended Class Action Complaint. In denying plaintiffs' motion to amend, the district court explained that the Second Amended Complaint sought to hold Talisman liable for its own acts, while the proposed pleading, "[w]hen stripped to its essentials, . . . seeks to hold Talisman liable for the actions of GNPOC." *Presbyterian Church of Sudan*, 453 F. Supp. 2d at 679. Thus, while the Second Amended Complaint alleged that Talisman aided and abetted the Government, the Third Amended Complaint alleged that Talisman aided and abetted GNPOC and Greater Nile. *Id.*

The district court ruled that, to plead new theories of liability three years after the deadline for amendment specified in the scheduling order, plaintiffs were required to show good cause for delay and the exercise of due diligence. *Id.* at 680 (citing Fed. R. Civ. P. 16; *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003); *In re Wireless Tel. Servs. Antitrust Litig.*, 02 Civ. 2673(DLC), 2004 U.S. Dist. LEXIS 19977, 2004 WL 2244502, at *5 (S.D.N.Y. Oct. 6, 2004)). The court found that plaintiffs failed to show good cause, and that "[i]t could even be said

---

ruling on trial evidence given its denial of summary judgment. The court did not articulate a general rule for considering evidence on summary judgment.

that the plaintiffs acted in bad faith in waiting until the eve of summary judgment practice to file the motion to amend." *Id.* at 680.

Once the deadline for amendment in a scheduling order has passed, leave to amend may be denied "where the moving party has failed to establish good cause." *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000). "[A] finding of 'good cause' depends on the diligence of the moving party." *Id.* We review a district court's denial of leave to amend for abuse of discretion.

Plaintiffs argue that they filed the Third Amended Complaint as promptly as they could at the conclusion of discovery. But the district court concluded that it was unreasonable for plaintiffs to hold the proposed amendment until discovery ended. Plaintiffs also argue that the proposed amendment would not have required new discovery and that the dates in the scheduling order were irrelevant because the theories pled in the Third Amended Complaint were already in the case. However, the Second Amended Complaint reads as if Talisman operated directly in the Sudan with no intervening subsidiaries, and it does not allege that Talisman acted through GNPOC. While references to GNPOC are sprinkled throughout the Second Amended Complaint, the gravamen is that Talisman conspired directly with the Sudanese government. Thus, the Third Amended Complaint, which alleged that Talisman aided and abetted GNPOC and that it conspired with Greater Nile, substantially revised plaintiffs' theory.

It is true that the issue of joint venture liability

was mentioned early in the case by Judge Schwartz in a 2003 decision denying Talisman's motion to dismiss on the ground that GNPOC was a necessary party. In that decision, the district court considered and rejected a number of arguments as to why the litigation could not proceed without GNPOC. Judge Schwartz explained that "nearly every paragraph describes alleged unlawful acts by Talisman, not GNPOC." *Presbyterian Church of Sudan,* 244 F. Supp. 2d at 352. In a footnote, the district court added that "[t]o the extent that the Amended Complaint alleges acts by GNPOC, . . . Talisman may potentially be held liable for the acts of other GNPOC members under a theory of joint venture liability." *Id.* at 352 n.50 (citation omitted)

Plaintiffs cite this footnote as evidence that the district court and Talisman were aware from early in the litigation that plaintiffs might proceed against Greater Nile and GNPOC on theories of joint liability. But Judge Cote observed that the Third Amended Complaint "dramatically alter[ed] the plaintiffs' theories of liability and the focus of the entire case," *Presbyterian Church of Sudan,* 453 F. Supp. 2d at 680, and Talisman vigorously contests the idea that the substance of the amended complaint was already understood to be part of the case. The district court supervised this case for three years before the filing of plaintiffs' motion and was thoroughly familiar with the facts and allegations, having written several lengthy opinions in the matter. We owe deference to the district court's analysis.

The district court also denied leave to amend on the alternative ground that amendment would be

futile. The court assessed whether plaintiffs could pierce the corporate veils of GNPOC and subsidiaries between GNPOC and Talisman: the court held plaintiffs could not pierce and that Talisman could not be liable on theories of joint venture or agency. *Id.* at 683-89.

We have not considered what law would be applied in seeking to pierce a corporate veil in the ATS context, and this case does not require us to reach the question. The district court discussed the issue in an abundance of caution; but we have no occasion to do so given our affirming the denial of leave to amend on good-faith grounds.

Finally, plaintiffs argue that even absent amended pleading, the district court should have considered their agency, joint venture, and veil piercing theories. We disagree. The district court concluded that these theories were insufficiently pled, and our independent review of the Second Amended Complaint supports the district court's conclusion. [16]

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

---

[16] Plaintiffs also appeal from the denial of their motions for class certification. Because we affirm the district court's grant of summary judgment as to all claims against Talisman, we do not reach that issue.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF NEW YORK

01-Civ. 9882 (DLC)

453 F. Supp. 2d 633;
2006 U.S. Dist. LEXIS 64579;
162 Oil & Gas Rep. 1109

Decided: September 12, 2006
Filed: September 12, 2006

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIAN DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A., FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf on the Estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KUEIGWONG RAT, LUKA AYUOL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG, YIEN NYINAR RIEK, and MORIS BOL MAJOK, and on behalf of all others similarly situated,
Plaintiffs,

-v-

TALISMAN ENERGY, INC., and REPUBLIC OF THE SUDAN,
Defendants.

TABLE OF CONTENTS

Introduction

Procedural History

Background

A. The Conflict in the Sudan

B. Oil Development in Southern Sudan Before 1996

C. Consortium

D. Lundin Oil

E. Talisman's Acquisition of Arakis

F. TGNBV

G. GNPOC Security Arrangements: 1999 to 2003

H. Logistical Support of the Military

I. "Buffer Zone" Strategy

J. The Airstrips

K. GNPOC Effort to Extend Operations "South of the River"

L. Talisman Denies Knowledge of Human Rights Abuses

M. The Plaintiffs' Injuries

Discussion

I. Motion for Summary Judgment

A. Conspiracy

B. Aiding and Abetting

1. The Elements of Aiding and Abetting Liability Under International Law

2. Genocide

3. Crimes Against Humanity

4. War Crimes

5. Substantial Assistance

a. Developing the Unity and Heglig Airstrips

b. Exploring "South of the River"

c. Financial Assistance to the Government

d. Acts of Assistance to the Military

e. Remaining Examples of Assistance

6. Causation

II. Motion to Amend Complaint

A. Choice of Law Rule

B. GNPOC

1. Veil Piercing

2. Joint Venture Liability

C. TGNBV and Goal Olie
1. Piercing the Veil
2. Agency Liability

D. English Subsidiaries

Conclusion

DENISE COTE, United States District Judge.

OPINION

This case involves the most serious of issues. The plaintiffs have suffered greatly, and in filing this lawsuit they sought to represent all of the non-Muslim Africans who live in and near oil rich lands in the southern Sudan who were injured during six years of the decades-long armed conflict that has gripped the region. They have sued two defendants: the Republic of the Sudan ("Government") and a Canadian corporation, Talisman Energy, Inc. ("Talisman"), for violations of international human rights. Talsiman [**3] indirectly held oil interests in the Sudan from October 1998 through March 2003, and its role in oil development in the Sudan and in the regional conflict is at the heart of this lawsuit.

As the litigation has unfolded, it has presented complex issues of international law and the reach of America's Alien Torts Statute ("ATS"), *28 U.S.C. § 1350.* [1] Talisman has resisted being hauled into an American court to answer charges arising out of events in Africa. The Republic of Sudan has refused

---

[1] As it has in previous Opinions in this litigation, this Opinion will refer to the statute as the Alien Tort Statute. *See Presbyterian Church of the Sudan v. Talisman Energy, Inc., 226 F.R.D. 456, 469 n.6 (S.D.N.Y. 2005).* Courts have also called the statute the Alien Torts Claim Act, *see e.g., Flores v. Southern Peru Copper Corp., 343 F.3d 140, 143 (2d Cir. 2003),* as well as the Alien Tort Act, *see, e.g., Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995).*

to make any appearance in the litigation and is in default.

[**4] Now, as the litigation enters its final stages, with summary judgment motions fully briefed and a trial scheduled for January 8, 2007, the critical issue is whether the plaintiffs have gathered sufficient admissible evidence to show that Talisman engaged in any of the violations of international law on which it stands accused by the plaintiffs. More precisely, the plaintiffs seek to hold Talisman liable [*639] for having conspired with or aided the Government in committing three crimes recognized under international law: genocide, crimes against humanity, and war crimes. The crime against humanity that is at stake is the widespread and systematic forcible transfer of a civilian population. The war crime is the targeted attacks by the military on civilians.

The plaintiffs have failed to locate admissible evidence that Talisman has violated international law. The hurdles the plaintiffs faced were many since (1) Talisman did not have any operational presence in the Sudan, and the plaintiffs did not sue the affiliate of Talisman that did have a presence in the Sudan and was more directly connected to events there; [2] (2) neither the Sudanese government nor the consortium that ran the oil exploration [**5] activities in the Sudan cooperated with the plaintiffs, and the plaintiffs' efforts to obtain evidence were severely frustrated; and (3) in any event the challenges of gathering the admissible evidence required to

---

[2] It is not clear, of course, that there was personal jurisdiction over that Talisman affiliate in the United States.

support plaintiffs' case in a desperately poor, distant country engulfed in civil war are significant.

For these and other reasons, in opposition to the summary judgment motion, the plaintiffs have not distinguished between the admissible and inadmissible. The plaintiffs repeatedly describe "Talisman" as having done this or that, when the examination of the sources to which they refer reveals that it is some other entity or an employee of some other company that acted. They assert that this or that event happened, when the documents to which they refer consist of hearsay embedded in more hearsay. Indeed, most of the admissible evidence is either statements made by or to Talisman executives, [**6] and the plaintiffs' descriptions of their own injuries, with very little admissible evidence offered to build the links in the chain of causation between the defendant and those injuries.

In recognition of the very serious gaps in their proof, the plaintiffs moved on the eve of the summary judgment practice to reconfigure the legal landscape with a far reaching proposal for amending their complaint. The thrust of the amendment would impose liability on Talisman for the activities of the consortium of oil companies that operated on the ground in the Sudan. This motion to amend, however, is unsupported by the legal or factual analysis that should have accompanied such an untimely and potentially transformative motion.

Talisman has separately moved to preclude plaintiffs from seeking categories of damages not previously identified by the plaintiffs. The motion was made after Talisman received plaintiffs' expert

report on damages, which indicated that plaintiffs were seeking to recover categories of damages they had not identified in their Rule 26(a)(1) statements served more than two years earlier.

As the following discussion explains, Talisman is entitled to summary judgment on the [**7] claims which the parties have litigated for five years. In addition, the plaintiffs are not entitled to amend their pleading. Talisman's motion to preclude certain categories of damages is denied as moot, as is that part of its motion for summary judgment that addresses plaintiffs' claim for disgorgement of Talisman's revenues from its investment in the Sudan.

The decision to grant summary judgment for Talisman becomes inescapable [*640] once the Federal Rules of Evidence and Civil Procedure are applied to the parties' submissions on this motion. It does not reflect a finding that the plaintiffs and their neighbors did not suffer great harms, or that the Republic of Sudan did not engage in gross violations of international law and the norms of civilized behavior. It does not even pass on the wisdom or propriety of Talisman's conduct. Instead, this Opinion addresses an issue that applies to every civil lawsuit filed in this country as it nears trial whether the issues being litigated are relatively mundane or of profound human consequence, as is true here. The issue is whether the plaintiffs have supplied sufficient admissible evidence to proceed to trial on their claims. They have not.

[**8] **Procedural History** [3]

[**9] Plaintiffs filed their class action complaint on November 8, 2001. [4] On March 19, 2003, the Honorable Allen G. Schwartz, to whom this case was originally assigned, denied Talisman's motion to dismiss brought on the basis of lack of subject matter jurisdiction, lack of personal jurisdiction, *forum non conveniens*, international comity, act of state doctrine, political question doctrine, failure to join necessary and indispensable parties and equity considerations. *Presbyterian Church of Sudan v. Talisman Energy,*

---

[3] For additional background, *see Presbyterian Church of Sudan v. Talisman Energy, Inc., 2005 U.S. Dist. LEXIS 18410, 01 Civ. 9882 (DLC), 2005 WL 2082847 (S.D.N.Y. Aug. 30, 2005)* (denying Talisman's motion to certify the Opinion of June 13, 2005 for interlocutory appeal); *Presbyterian Church of Sudan v. Talisman Energy, Inc., 2005 U.S. Dist. LEXIS 18399, 01 Civ. 9882 (DLC), 2005 WL 2082846 (S.D.N.Y. Aug. 30, 2005)* (denying Talisman's motion for judgment on the pleadings based on the Statement of Interest from the United States Government); *Presbyterian Church of Sudan v. Talisman Energy, Inc., 2005 U.S. Dist. LEXIS 17932, 01 Civ. 9882 (DLC), 2005 WL 1994098 (S.D.N.Y. Aug. 19, 2005)* (denying plaintiffs' motion for discovery sanctions); *Presbyterian Church of Sudan v. Talisman Energy, Inc., 2005 U.S. Dist. LEXIS 8149, 01 Civ. 9882 (DLC), 2005 WL 1060353 (S.D.N.Y. May 6, 2005)* (resolving issues surrounding certain plaintiffs' standing to sue); *Presbyterian Church of Sudan v. Talisman Energy, Inc., 2004 U.S. Dist. LEXIS 17030, 01 Civ. 9882 (DLC), 2004 WL 1920978 (S.D.N.Y. Aug. 27, 2004)* (denying Talisman's second motion to dismiss).

[4] The complaint was amended on February 25, 2002, and August 18, 2003.

Inc., 244 F. Supp. 2d 289 (2003) ("2003 Opinion"). [5] This action was assigned to this Court on April 16, 2003. On June 13, 2003, a Scheduling Order set the dates for motion practice and established that fact discovery would close on March 25, 2005. During the discovery period, the parties deposed ninety-five witnesses.

[**10] An Opinion of March 25, 2005 denied plaintiffs' motion for certification of a class. *Presbyterian Church of the Sudan v. Talisman Energy, Inc., 226 F.R.D. 456 (S.D.N.Y. 2005).* Plaintiffs' second motion for certification, with a narrower class definition, was denied in an Opinion of September 20, 2005. *Presbyterian Church of Sudan v. Talisman Energy, Inc., 2005 U.S. Dist. LEXIS 20414, 01 Civ. 9882 (DLC), 2005 WL 2278076 (S.D.N.Y. Sept. 20, 2005).* Between the plaintiffs' two motions for class certification, Talisman moved for judgment on the pleadings based on the Supreme Court's decision in *Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004)*, and the Second Circuit's decision in *Flores v. Southern Peru Copper Corp., 406 F.3d 65 (2d Cir. 2003).* Talisman claimed that the standards articulated in those two opinions [*641] made the 2003 Opinion's decision to recognize corporate and secondary liability under the ATS clearly erroneous. Talisman's motion

---

[5] On March 18, 2003, Judge Schwartz ruled that the Government of Sudan must make an appearance if it wished to assert its immunity under the Foreign Sovereign Immunity Act (FSIA), *28 U.S.C. § 1602 et seq. Presbyterian Church of Sudan v. Talisman Energy, Inc., 2003 U.S. Dist. LEXIS 3981, 01 Civ. 9882 (AGS), 2003 WL 1342532 (S.D.N.Y. Mar. 18, 2003).*

was rejected in an Opinion dated June 13, 2005. *Presbyterian Church of the Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331, 332 (S.D.N.Y. 2005).*

In the Fall of 2005 a trial [**11] date was set for January 8, 2007. Talisman moved for summary judgment on April 28, 2006. On the same day that Talisman moved for summary judgment, each side moved to preclude testimony from opposing expert witnesses. Talisman moved against seven expert witnesses offered by the plaintiffs: Gaspar Biro, Douglas Johnson ("Johnson"), Salem Mezhoud, Ronald Vollmar, James Levinsohn, Sherwood Goldberg ("Goldberg"), and Sharon Hutchinson. The plaintiffs moved against four of Talisman's experts: Peter Bechtold, Andrew Buchanan, Aidan Davy and Emery Brusset.

Plaintiffs' opposition to Talisman's summary judgment motion was filed on May 26, 2006. Their papers included a memorandum of law, a thirty page response to Talisman's Rule 56.1 statement of material undisputed facts ("Responsive Statement"), a seventy-two page additional statement of material disputed facts ("Additional Statement"), and two sets of exhibits. One set contained seventy-one exhibits [6] in two volumes. The second set contained one

---

[6] A subsequent submission added three more exhibits.

hundred and seventeen exhibits in ten volumes.[7] [**12]

Despite the volume of plaintiffs' evidence, their arguments rest on a dozen or so pieces of evidence to which they refer repeatedly. Those pieces of evidence include excerpts from three depositions: James Buckee ("Buckee"), Talisman's CEO; Ralph Capeling ("Capeling") the general manager of Talisman (Greater Nile) B.V. or TGNBV, Talisman's indirect subsidiary which held Talisman's interests in the Sudan; and Mark Reading ("Reading"), a security advisor employed by TGNBV. Plaintiffs rely as well on a handful of TGNBV documents and several documents which appear to have been generated by Talisman itself. Many of these documents appear [**13] to contain hearsay, including reports about events witnessed by others. Some of the plaintiffs' most striking accusations against Talisman are drawn from affidavits prepared by Ian Taylor ("Taylor") for litigation against Talisman in Canada. Taylor was never deposed, is now deceased, and his affidavits are inadmissible.

On April 12, 2006, just two weeks before the summary judgment motion was filed, the plaintiffs

---

[7] The Additional Statement referred to documents not by an exhibit number but by Bates number. At the request of the Court, the plaintiffs revised their submission and provided citations to exhibit numbers. In their revised submission the plaintiffs often cite to collections of exhibits without identifying a document or passage. The end result has been to make it particularly challenging to assess whether plaintiffs have admissible evidence to support their arguments.

filed a motion to amend their complaint. The complaint on which the parties conducted discovery was the Second Amended Complaint, filed on August 18, 2003 ("2003 Complaint"). The proposed Third Amended Complaint shall be referred to as the 2006 Complaint. The motion to amend is addressed after the discussion of the summary judgment motion.

Background

The following facts are undisputed, or taken in the light most favorable to the plaintiffs, unless otherwise noted. In order to describe as fairly as possible the [*642] evidence the plaintiffs present, the description of events that follows is largely taken from the documents on which the plaintiffs have placed the greatest reliance, without a careful analysis of the admissibility of this evidence. It should be borne in mind [**14] that the plaintiffs have not yet shown that a percipient witness is available to testify to many of the events that are described below.

A. The Conflict in the Sudan

The recent history of the Sudan has been described several times in this litigation. *See Presbyterian Church, 226 F.R.D. at 461-63*; *Presbyterian Church, 244 F. Supp. 2d at 296-99*. Because that history provides context to the issues presented in Talisman's motion for summary judgment, it is summarized here.

Sudan is the largest country in Africa and has a population of approximately 41 million. The population in the North is predominately Arab and

Muslim, while the population in the South is largely non-Muslim and African. The two largest ethnic groups in southern Sudan are the Dinka and Nuer. A map showing the boundaries of the Sudan follows:

[SEE ILLUSTRATION IN ORIGINAL]

[*643] Since gaining its independence in 1956, the Sudan has suffered through two long periods of civil war fueled by the struggle between the Government, which is Arab-dominated and based in the North, and rebels based in the South. The second, more recent civil war began in 1983, and was initially a struggle against [**15] the Government waged by the Sudan People's Liberation Army ("SPLA") led by John Garang ("Garang"). In 1991, the SPLA split into competing factions. From 1991 to 1997, those factions fought each other, as well as the Government.

In April 1997, the Government, and major rebel groups with the exception of the SPLA, signed the Khartoum Peace Agreement ("Khartoum Agreement"). As part of the agreement the rebel groups became the Southern Sudanese Defense Force ("SSDF") and entered into a partnership with the Government. Beginning in 1998, the SSDF split apart as senior military commanders left and formed their own militia groups. Some of the militia groups that were formed out of the SSDF were funded by the Government. By the end of 2000, the Khartoum Agreement had collapsed and fighting broke out again in the South among militia groups, as well as between militia groups and the Government. It is undisputed that during the time that Talisman was involved with the Sudan, southern Sudan was the site of increasing levels of violent conflict among a

number of armed groups.

B. Oil Development in Southern Sudan Before 1996

After oil was discovered by Chevron in southern Sudan in 1979, the [**16] Government granted concessions to explore and extract oil in this region by dividing territory into numbered "blocks." The Sudan is made up of twenty-six states, and the oil concessions relevant to this litigation are spread among five of them: Unity (also referred to as Western Upper Nile), Western Kordofan, Northern Bahr el Ghazal, Jonglei, and Warab. [8]

Block 1, or the Unity oilfield, is north of the town of Bentiu and is now the southern terminus of the Sudan oil pipeline ("Pipeline"), which runs to the Red Sea in northeast Sudan. Block 1 is the only one of the three blocks that is located entirely within Unity State. Block 2, or the Heglig oilfield, is northwest of and adjacent to Block 1. Block 2 is mostly located in Western Kordofan State. Block [**17] 4, or the Kaikang oilfield, is a large block to the south and west of Blocks 1 and 2 and is primarily located in Western Kordofan, Northern Bahr el Ghazal and Unity States. The Government also designated Block 5A, which figures prominently in this litigation. Block 5A abuts a portion of the eastern borders of Blocks 1

---

[8] The spelling of the names of these states, which differs from the spelling on the map that follows, is drawn from the CIA World Factbook. *See* The World Factbook, Sudan (last updated Aug22, 2006), https://www.cia.gov/cia/publications/factbook/geos/su.html.

and 4, and is primarily located in Unity State, but also touches Jonglei, and Warab.

The maps that follow show the geography of the relevant states and the boundaries of the oil concession:

[*644] [SEE ILLUSTRATION IN ORIGINAL]

[*645] [SEE ILLUSTRATION IN ORIGINAL]

On August 29, 1993, State Petroleum Company ("SPC"), a Canadian company, purchased the rights to Blocks 1, 2, and 4 and entered into a production sharing agreement with the Government to develop these blocks exclusively. From 1993 to 1996, SPC was the only oil company operating in Blocks 1, 2 and 4. The total area of these blocks consisted of 130,000 acres of "developed" land with proven oil reserves, and nearly 12 million acres of "undeveloped" land with no proven oil reserves.

In May 1994, Arakis Energy Corporation ("Arakis"), a Canadian corporation, [*646] acquired SPC, which became a wholly owned subsidiary of Arakis. [**18] In 1996, the Government attempted to terminate SPC's concession rights, alleging that SPC had failed to perform drilling and production activities under the production sharing agreement. In reaction, SPC began to look for partners to build a consortium that could increase production levels. It found several.

C. Consortium

On November 29, 1996, China National Petroleum Corporation ("CNPC"), Petronas Carigali Overseas

SDN BHD ("Petronas"), and Sudapet Ltd. ("Sudapet") joined with SPC (collectively "Consortium Members") to establish a consortium to conduct oil exploration in the Sudan and to construct, own and operate the Pipeline. All of the Consortium Members except for SPC are wholly owned by governments: China, Malaysia, and the Republic of Sudan, respectively. An interim agreement between the Consortium Members became effective on November 29, 1996 ("Interim Agreement"). On February 28, 1997, they entered into the Consortium Agreement ("Consortium Agreement"), which updated the Interim Agreement.

In addition to these two documents, the consortium's activities are governed by two other sets of agreements. One set covers the relationship between the Consortium Members and the [**19] Government and relates to the three separate but related projects undertaken by the Consortium Members. The oil operations conducted in Blocks 1, 2 and 4 are governed by the Exploration and Production Sharing Agreement ("EPSA"); the construction and operation of the Pipeline is governed by the Crude Oil Pipeline Agreement ("COPA"); and the rights to use the land on which the Pipeline is constructed is governed by the Surface Lease Agreement ("Surface Agreement").

A second set of agreements governs the relationship among the Consortium Members and their conduct of the projects undertaken by the consortium. The Joint Operating Agreement ("JOA") covers oil exploration, production, and development in Blocks 1, 2 and 4. The Joint Construction and Operating Agreement ("JCOA") covers the

construction and operation of the Pipeline.

The Consortium Members established the Greater Nile Petroleum Operating Company Limited ("GNPOC") as the entity which would conduct operations for the Consortium Members under their agreements with the Government. [9] Both the JOA and the JCOA identify GNPOC as an independent contractor. The JOA, JCOA, EPSA and COPA will be referred to collectively as the "GNPOC [**20] Project Agreements." The shares of GNPOC were 40% owned by CNPC, 30% owned by Petronas, 25% owned by SPC and 5% owned by Sudapet. Thus, the Canadian company owned one-quarter of GNPOC.

D. Lundin Oil

In 1998, Lundin Oil AB ("Lundin Oil"), a Swedish company, obtained the rights to explore for and produce oil in Block 5A. Lundin Oil conveyed its interests in Block 5A to Lundin Petroleum AB ("Lundin Petroleum"), an affiliated Swedish company, in 2001. Lundin Petroleum sold its interests in Block 5A in April 2003. Lundin Oil and Lundin Petroleum shall be referred to collectively as Lundin. During its period as the operator, Lundin constructed and maintained roads within Block 5A. Lundin's [*647] interests in the Sudan were held through several subsidiaries including International [**21] Petroleum Corporation ("IPC") and many documents

---

[9] GNPOC was a party to the JCOA and was added as a party to the JOA by a supplemental deed dated July 23, 1999. The intent to create GNPOC is expressly described in the Consortium Agreement. GNPOC is not a party to the agreements with the Government.

on which the plaintiffs rely refer to interactions between GNPOC and IPC.

E. Talisman's Acquisition of Arakis

Talisman, headquartered in Calgary, Alberta, is an oil and gas exploration and production company with global operations. Talisman's international assets are generally held by subsidiaries. In October 1998, during a period of hope created by the Khartoum Agreement, Talisman acquired Arakis. Prior to acquiring Arakis, senior Talisman officials traveled to the Sudan to conduct due diligence. While in the Sudan the Talisman officials met with Government officials including Rick Machar ("Machar"), then the First Assistant to the President of the Sudan and the head of the Southern Sudan Coordinating Council ("SSCC"). The SSCC was a political body established by the Khartoum Agreement to serve a coordinating and supervisory role in the southern Sudan and to serve as link between the South and the Government.[10]

[**22] The Talisman officials visited several GNPOC sites, and spoke with representatives of the British government in the Sudan about the political and security situation. From 1898 through 1956, Sudan had been a British-Egyptian condominium.

---

[10] Under the Khartoum Agreement, the SSCC was to be composed of ministers appointed by the President of the SSCC in consultation with "Southern political forces" The Governors of the southern states also sat on the SSCC. The President of the SSCC was to be appointed by the President of the Sudan "in consultation with the parties signatory" to the Khartoum Agreement.

Talisman commissioned two independent reports concerning the security and political situation in the Sudan.

Through these efforts, Talisman learned that GNPOC had an agreement with the Sudanese Army that it would provide security for the GNPOC oil operations and that GNPOC security advisors had daily contact with the Sudanese Army. Robert Norton ("Norton"), who had served as the head of security for Arakis in the Sudan from 1994 to 1998, told Talisman's Buckee and Talisman Vice President Mary Sheppard ("Sheppard") in September 1998 during a "roundtable" meeting held in Canada concerning Canada's relationship with Sudan, that the Government used not just its military but also Government-sponsored militia to protect GNPOC oil fields. Norton also expressed his opinion that Talisman's presence in the Sudan would make oil exploration in the Sudan successful, and that that would increase Government oil revenues and tip the military balance in the Sudan [**23] in favor of the Government. [11]

---

[11] In a declaration in opposition to this motion Norton asserts that he explained to Talisman Vice President Nigel Hares ("Hares") that before any oil development work was done in a new area, the Sudanese military "cleared" the proposed work area of inhabitants to create a "safety zone." At his deposition, Norton had stated that he did not "specifically recall" the conversation with Hares and denied having personal knowledge of the Sudanese military committing human rights violations against civilians. A witness may not use a later affidavit to contradict deposition testimony in an effort to defeat a motion for summary judgment. *See Bickerstaff v. Vassar Coll., 196 F.3d 435, 455 (2d Cir. 1999).*

One of the attendees at the roundtable was Melville Middleton ("Middleton"), a Canadian associated with Freedom Quest International. Middleton asked whether Talisman had contacted groups with knowledge of human rights violations by the Government, and was told by Sheppard [**24] that the Government had informed [*648] Talisman that "the deal was off" if Talisman talked to the "other side." Middleton advised Sheppard, Buckee, and other Talisman officials at the roundtable that GNPOC and the Government were using the Sudanese military to evict civilian inhabitants forcibly and create a "cordon sanitaire" around existing oil fields. Middleton opined in that conversation that the Government would use oil revenues to buy weapons and fund militias to further the Government's "genocidal policies."

One of the two independent studies commissioned by Talisman was by a security consultant, Control Risks Group. [12] An April 1998 report prepared by Control Risks Group ("Moss Report") described three roles for the Sudanese military in protecting GNPOC operations as: "[a]rea domination", "[m]ilitary protection teams for key assets," and "[a]rmed escorts for road travel during hours of darkness." The Moss Report concluded that the presence of army units "creates a substantial deterrent to rebels, bandits or criminals."

---

[12] The Control Risks Group study was commissioned by Arakis at Talisman's behest in an effort to keep Talisman's interest in the Sudan confidential.

[**25] At his deposition, Buckee explained that Talisman acquired Arakis because the opportunity to explore for and produce oil in the Sudan was a "technically" good project with attractive terms, and because Talisman thought it could do some good in a very poor country, including potentially serving as a catalyst for peace. In the period leading up to the acquisition, Arakis was having difficulty meeting its financial obligations to GNPOC. Talisman provided over $ 46 million in cash to Arakis through a credit arrangement so that it could meet those obligations.

After acquiring Arakis, Talisman formed a Sudan Steering Committee ("Steering Committee") comprised of senior-level Talisman officials that met on a weekly basis to address non-operational matters relating to Talisman's investment in the Sudan, including public relations, community development and security. The Steering Committee included Buckee; Vice-Presidents Talisman Vice President Nigel Hares ("Hares") and Sheppard; and Reg Manhas, who served as Talisman's head of Corporate Social Responsibility.

F. TGNBV

After it acquired Arakis, Talisman transferred the interests that Arakis had held in GNPOC and in the GNPOC Project [**26] Agreements to State Petroleum Corporation B.V., an indirect subsidiary of Talisman, which was renamed Talisman (Greater Nile) B.V. or TGNBV on December 10, 1998. TGNBV was a wholly-owned subsidiary of Goal Olie-en-Gasexploratie B.V. ("Goal Olie"). In the period that it

owned TGNBV, Goal Olie was wholly owned by two English companies, first Supertest Petroleum (U.K.) Limited ("Supertest") and then Igniteserve Limited ("Ingniteserve").[13] Both Supertest and Igniteserve were wholly owned by Talisman Energy (UK) Limited ("Talisman UK"). Talisman UK was a direct and wholly-owned subsidiary of Talisman. On March 12, 2003, Talisman and Goal Olie sold TGNBV to ONGC Videsh Ltd., an Indian oil and gas company. With that sale, Talisman's investment in oil development in the Sudan ended.

The relationship between Talisman and TGNBV was structured through an agreement called a TASA. Under the TASA, Talisman provided advice to TGNBV on oil operations [**27] in the Sudan, including advice [*649] on topics such as security, development, and managing the relationship with the Government. For its part, TGNBV sent TASA requests to Talisman, principally on business and operational issues. These requests were usually made by Capeling, TGNBV's General Manager.

Talisman also provided TGNBV with employees, including Capeling, through a practice called secondment. Secondment refers to the assignment of an individual from one of Talisman's companies to another for a defined period of time, usually in the range of two to three years.[14] Capeling reviewed the

---

[13] Supertest sold its shares in Goal Olie to Igniteserve on December 23, 1999.

[14] What appear to be the minutes of a TGNBV Board of Directors meeting describe employees seconded to TGNBV from Talisman as individuals who would "technically continue to be

compensation of seconded employees, their job performance, and the continued need for their positions. The seconded TGNBV employees also reported to GNPOC line managers.

[**28] TGNBV did not actually conduct any oil operations in the Sudan; oil exploration and production work was performed by GNPOC. Of particular importance to the issues in this litigation, however, TGNBV's staff included two security advisors, Mark Dingley ("Dingley") and Mark Reading ("Reading"). Reading is a retired British soldier. These two men traveled widely through the GNPOC concession and neighboring areas and were the principal liaison with Mohammed Mohktar ("Mohktar"), the head of GNPOC security. They prepared periodic reports assessing the danger presented to TGNBV employees working in the GNPOC concession and the threat to the GNPOC oil operations. The reports were sent to "key personnel" in TGNBV and sometimes also went to senior Talisman officials, "depending on the nature of the report." The plaintiffs rely heavily on three documents authored by Dingley and Reading, and on their deposition of Reading.

---

employed or retained as consultants by Talisman" but would be "seconded on a part-time or full-time basis to [TGNBV] and, in carrying out their duties as secondees, would be under the authority and subject to the decisions of the board of directors of [TGNBV]."

G. GNPOC Security Arrangements: 1999 to 2003

During the period 1999 to 2003, the Government was heavily engaged in providing security for the GNPOC concession. The Government commitment included about 1,000 military and police officers assigned to protect the oilfield [**29] operations themselves; about 1,300 intelligence officers who worked to gather intelligence in the communities within the concession; and about 5,000 military personnel who were stationed in the concession. These Sudanese security forces were under the control of Sudan's Security Council, which was headed by Sudan's Minister of Mines and Energy.

GNPOC had its own security force, which was unarmed and which served as a liaison with the Government forces. From 2000 through 2003, Mohktar was the head of GNPOC security.

H. Logistical Support of the Military

In October 2000, Talisman and TGNBV worked on drafting guidelines for GNPOC's interaction with and support of the military forces in the concession area. The guidelines listed acceptable and unacceptable services and supplies, drawing a distinction between support for the Government's defense of GNPOC oil exploration activities and any offensive military action. For example, the proposal allowed GNPOC to share its communications facilities (radios, fax), to provide accommodations [*650] at GNPOC rig and facility sites and at checkpoints in the concession area, to repair non-combat vehicles, and to give emergency medical treatment. Two [**30] types of

services categorized as "unacceptable" were allowing the military to fill fuel barrels to be taken to strategic locations and to use GNPOC vehicles since GNPOC would have "no control" over how the fuel or vehicles were ultimately used.

Although not everyone within GNPOC believed that it increased the security of GNPOC employees, it was not uncommon for soldiers to ride in GNPOC trucks that delivered employees to well sites. At one point, GNPOC protested the practice and the military agreed that soldiers would patrol the oil field every night instead. A GNPOC contractor once witnessed soldiers "going to the battle" being transported in GNPOC trucks. Sudanese military officers were also allowed to fly on GNPOC flights.

In May 1999, GNPOC, the Government and IPC built two all-weather roads: one linking the Unity camp to Rubkona and one linking El Toor, an oilfield in Block 1, to Fariang. Both Rubkona and Fariang had army bases and the roads were considered important to the security of the oilfield. GNPOC also constructed a ring road around the Unity camp.

I. "Buffer Zone" Strategy

As part of the strategy for protecting the oil field operations, Sudanese forces cleared [**31] key areas of villagers. According to Tabai Deng Gai ("Gai"), a former governor of Unity State, between the signing of the Khartoum Peace Agreement in 1997 and May 1999, the Sudanese military opened garrisons in the GNPOC concession area for defense of the oil operations. When a garrison was established, local police forces were expelled and villages were

destroyed. Gai testified that he was aware of but had not seen an agreement between the Government and "Talisman" to protect oil operations and pipeline construction, and that pursuant to the agreement, the Government forced people to leave villages by attacking the villages with any means necessary, including small arms fire, artillery, helicopter gunships and bombers.[15] Gai explained that "it is an affair between the Sudanese army, the Arafiah (?) militia, the Talisman and their agreement entails that bridges have to be destroyed, people have to be displaced, people have to be killed if they do not want to go." (Question mark included in transcript.) Kwong Danhier Gatluak ("Gatluak") was chief of military intelligence for the SSDF from 1991 to 1999 and chief of military intelligence for the Sudan People's Defense Force ("SPDF") [**32] from 1999 to 2002.[16] Danhier testified that between 1997 and 2003, the Government forces routinely attacked undefended civilian villages in the GNPOC oil concession to clear the area for oil exploration.[17]

---

[15] While there is a document from 2000 containing a recommendation that GNPOC enter into a formal security agreement with the Government, the plaintiffs have not pointed to other documentary evidence that a formal agreement was ever executed. It is not clear who the author of the 2000 document is and to whom the document was distributed.

[16] The SPDF, which is also referred to as the Southern People's Democratic Front, was a militia established by Machar with former members of the SSDF following the collapse of the Khartoum Agreement.

[17] The 2003 Complaint refers to a May 1999 Communique which the plaintiffs do not appear to have submitted with their

[**33]

[*651] While it is unclear how much of Gai's and Danhier's testimony is based on personal knowledge, a report written by Dingley in 1999 confirms the existence of a "buffer zone" strategy, at least on a small scale. It reads:

> The military strategy, driven it appears by the GNPOC security management, is to create a buffer zone, i.e. *an area surrounding both Heglig and Unity camps* inside which no local settlements or commerce is allowed. This has been achieved with the exception of all but a few nomadic family tents, and extends to approximately 8kms around Heglig and 5kms around Unity. The advantage of this buffer zone is that it allows for easier control of movement in the vicinity.

(Emphasis supplied.)

A report released in January 2000 by John Harker ("Harker Report") on behalf of the Canadian government provides further evidence of displacement. [18] The Harker Report relates that between

---

summary judgment papers. As Talisman correctly observes, at this stage as well as at trial, the plaintiffs may rely only on authenticated, admissible evidence. The plaintiffs appear to concede that they are unable to authenticate the Communique and it will not be addressed further.

[18] The Harker Report provided an assessment of reports of slavery in the Sudan and the link between oil development and human rights violations, particularly forced displacement.

April and June 1999, the population of Ruweng County had declined by 50%, which it attributed primarily to oil development. Ruweng County is located in Block 1.[19] The report noted, however, that the displacement was "more or less complete by the time Talisman arrived on the scene" [**34] but that it had continued during the time of Talisman's involvement. Separately, at a meeting in Khartoum, Machar, then head of the SSCC, informed Buckee that "400,000 people had been displaced" in the Sudan.[20]

A June 2002 TGNBV security report describes the "buffer zone" around Heglig camp:

> The focus will return to the ring road at Heglig. The remaining nomads (from the north) are being "encouraged" to complete their move through the area as soon as possible. The area within the security ring [**35] road while not a sterile area as found on security operations elsewhere (eg [sic] Algeria) is moving in that direction. Heglig Market has completed its first season out of the area (it was moved this year to the outside of the ring road). This

---

Talisman contends the Harker Report is inadmissible hearsay.

[19] The Report adopted the conclusion of a United Nations official that "a 'swath of scorched earth/clear territory' is being created around the oilfields."

[20] It is not clear from the deposition excerpt provided by the plaintiffs when this meeting took place.

> step up in security with-in the ring road I believe is a good thing, it is partly in response to cattle raiding activities as witnessed last week when shots were fired close to Heglig in the early hours.

J. The Airstrips

There were three airstrips within the GNPOC concession area, two of which were controlled and maintained by GNPOC.[21] GNPOC's two airstrips are referred to as the Unity airstrip and the Heglig airstrip.[22] GNPOC used the airstrips [*652] to support its activities within the concession. The two GNPOC airstrips were also used by the Sudanese military to provision their troops, and on occasion for defensive military activities. For at least some period of time, each of these airstrips was also a base for attacks against rebel forces and, the plaintiffs contend, against civilians including nine of the plaintiffs. GNPOC and military aircraft operating at the airstrips shared the same fuel tanks, and GNPOC

---

[21] Rubkona airstrip is also located in Block 1 but is close to the border with Lundin's Block 5A, and supported Lundin's operations in Block 5A.

[22] It is not entirely clear who owned the Unity and Heglig airstrips. Under the terms of the EPSA, land acquired by GNPOC was to "become the Property of the Government as soon as it is purchased or acquired." Title to other fixed and movable assets was transferred to the Government once the costs of those assets had been recovered by GNPOC from revenue generated from oil production. There are statements in TGNBV documents, however, to the effect that the Heglig airstrip was a private airfield for support of GNPOC operations.

occasionally allowed [**36] military aircraft to use GNPOC fuel.[23]

[**37] The Heglig airstrip was used extensively by the military. As of 2000, a dozen military flights came into the Heglig airstrip each week to supply Government security forces.

Of greatest concern for this litigation, the Heglig airstrip was also used by Government forces as a staging area for combat operations. A November 1999 TGNBV security report describes baggage trolleys being used to move ordinance around the airfield and Antonov cargo planes that had been converted for use as bombers being loaded with bombs weighing perhaps as much as 500 pounds. According to a TGNBV security officer, the use of the Heglig airstrip made sense for the Antonovs because it was "much closer to the area that they were bombing" than any other airstrip.

The Harker Report describes the use of the Heglig airstrip by military aircraft: "flights clearly linked to the oil war have been a regular feature of life at Heglig airstrip." The report contends that the facility had been used by "helicopter gunships & Antonov bombers of the [Government]. These have armed and

---

[23] GNPOC and the military kept fuel in the same fuel tanks but also were aware of how much fuel each had brought into the camp and how much fuel had been used, in essence maintaining a separate fuel balance sheet. Garth Butcher, a Talisman employee seconded to GNPOC who worked at Heglig, testified that in instances when the military had exhausted its supply of fuel, GNPOC would supply military aircraft with fuel until the military could deliver more.

re-fuelled [sic] at Heglig and from there attacked civilians." [24]

[**38] Talisman, and in particular its CEO Buckee, initially opposed the Government's use of the airstrips for its helicopter gunships or combat operations. It felt that such operations would draw rebel attacks on the airfields and thus posed a significant threat to the safety of TGNBV and GNPOC personnel. Talisman's objections were occasionally successful: a TGNBV report in January 2000 described a string of objections made in November and December 1999 and stated that "[m]ilitary use of the Heglig airstrip has not been observed since December 1999." By June 2000, however, combat operations had resumed. TGNBV security reports describe helicopters and Antanov bombers in June 2000, and Antanov bombers flying runs "around the clock" in October 2000.

The written proposals for moving the Government combat operations away from the Heglig airstrip included a January 2000 TGNBV suggestion that the military be asked to move to the Unity airstrip and a May 2000 suggestion that Talisman secretly pay for a helicopter gunship base and airfield within the GNPOC oil concession area. There is no evidence that such [*653] a base was ever constructed or that this idea was ever pursued further. Indeed, Buckee [**39] testified that the idea was "immediately rejected as being a very silly idea."

---

[24] Talisman contests the admissibility of the Harker Report, in particular its statements about air attacks against civilians.

The Unity airstrip began as just a dirt strip that was not used with any frequency until it was upgraded in approximately 2000. By 2001, the Sudanese military was using the Unity airstrip as well as an airfield for its helicopter gunships.

A TGNBV security report from a meeting with GNPOC's Mohktar in May 2001, indicates that Mohktar was not willing to ask the military to move from Unity to Rubkona at that time despite a personal request by Buckee just two weeks earlier that the military cease using the Unity airstrip.[25] Mohktar felt that the military helicopters were a "key" component in the Government's strategy for dealing with "Gadet" [26] and that its operations "could not continue without them." Rubkona was not an attractive alternative in Mohktar's view since it was less secure, with too many rebel sympathizers in the vicinity. An email from Reading to the Talisman Sudan Steering Committee described Unity as "an excellent location" from the Government's point of view because it allowed them to support operations in a variety of important areas without requiring the helicopters to carry extra fuel. [**40]

The same TGNBV document from January 2000 describes a series of conversations with Mohammed

---

[25] The author of the report is not identified.

[26] "Gadet" refers to Peter Gadet, a military commander who had initially served in a militia that had splintered from the SSDF, but then had broken from that splinter group, and was believed to be affiliated with the SPLA.

Khalifa Hussein, a GNPOC employee, about the use of Heglig for bombing attacks. The report indicates that Khalifa received a promise that the practice would stop, but that it soon resumed. This account is consistent with a TGNBV security report that suggests transferring the Unity airstrip to the Sudanese military, in part because of TGNBV's inability to control its use:

> My personal view is that some thought should be given to turning over Unity Airstrip to the military in an official capacity, I struggle to see any alternative other than the present line of "defensive only" operations. [27] I think it is time to accept that they will not [**41] move to Rubkona in the forseeable future (still a longer-term aim) and that the military will not build their own facilities. *They (government) have strung this along this far and I think they will continue to do that despite on occasions telling us what we want to hear*. This I feel is the reality of the situation.

(Emphasis supplied.)

---

[27] The reference to "defensive only" operations is a reference to Talisman's and perhaps TGNBV's desire to restrict military use of the airstrips to defensive operations only, and to forbid use of the airstrips for any offensive operations. As the Talisman and TGNBV documents reflect, however, this was a difficult line to draw, and one that it was nearly impossible for GNPOC to enforce.

TGNBV security reports reflect ambivalence about the presence of the helicopter gunships at the GNPOC airstrips, noting that they did provide defense for the GNPOC operations, but that the consortium could not monitor or control what they did once they were in the air. It is worth [**42] quoting a May 2001 TGNBV security report in some detail:

> [T]hese are the weapons of choice for this type of warfare. They are ideal for the area and terrain in which they have to operate. From a purely pragmatic point of view they offer great depth and defence of the oil operation in Block 4 and in the future south of the river. [*654] *They provide legitimate defence of the oil assets* and from a military point of view are a necessity due to the risk and high threat assessment. *The problem from our perspective is that although we can repeatedly say all that, when they are away from the oil area who really knows what they do?* There is absolutely no way of monitoring. To suggest such a thing would be a disaster and impractical and in their [the Government's] defence many of the other companies are calling for a more "robust" attitude to the security threat in Block 4 and elsewhere. I'm sorry to be the bearer of bad news... this problem will not go away no matter how many security protocols etc. are signed.

> The only improvement to the current situation would be at a higher level to get the gunships to operate out of Rubkona or have the military have their own purpose [**43] built facilities. Both of those suggestions are fraught with difficulties, in the fact that would oil money build the facilities (?) and even if the gunships move to Rubkona, it is still an oil facility and is sited in the GNPOC concession.

(Emphasis supplied.) (Question mark in original.) The report also noted that the dual use of the airstrip was not unique to GNPOC. It recited that

> Many other airports in Sudan have dual roles, El Obeid is a classic case where the [UN/World Food Program] planes operate from, and this is done alongside [Government] offensive operations. When picking up Ambassadors this week it was plain to see 'ordnance' [sic] in close proximity to aid planes.

After a rebel rocket attack on the Heglig facility in August 2001, Buckee revised his assessment of the level of the threat to GNPOC facilities and dropped his objections to the presence of the helicopter gunships at the Heglig airstrip. The rebels had fired 13 rockets from eight to twelve kilometers away from the facility. At that point, Capeling and the TGNBV security advisors also came to believe that the presence of helicopter gunships at Heglig would assist in the protection [**44] of the GNPOC oil

facilities since the helicopters were useful in conducting "reconnaissance." Capeling sent a letter to the Government after the attack on Heglig emphasizing the importance of securing the safety of the people working for GNPOC.

Buckee also expressed concern about Government air attacks that were not directly related to the airstrips. He wrote to Major General Bakri Hassan Saleh, Minister of National Defense for the Government of Sudan, on February 12, 2001, to protest bombings by the Government in the South. The letter states that "Talisman has no capacity to verify reports of bombing, as the alleged incidents are occurring well outside our area of operations" but cautions that whatever "the military objectives may be, the bombings are universally construed as violations of international humanitarian law." Buckee urged Saleh to "stop any bombing that has a chance of inflicting damage on civilians."

On February 20, 2002, military aircraft attacked a World Food Program site at Bieh, a town in Block 5A that a TGNBV security report described as "effectively a no-go area" for the Government. A TGNBV security advisor wrote in a March 5, 2002 report about the incident that [**45] it was "reasonable to assume that the gunship that engaged the [World Food Program] site operated out of Unity Airstrip."

The report does not appear to be based on any first-hand observations of the attack. Its assumption that the helicopters involved in the attack flew from the Unity airstrip seems to be drawn from reports of a white helicopter near Bieh around the [*655] time

of the attack. There was a white helicopter owned by the military that operated from the Unity airstrip. The report also raises the possibility that the attack was triggered by the presence of SSIM, a militia group opposed to the Government, near the site of the food distribution.

The only first-hand account of the attack on Bieh in evidence is from one of the plaintiffs, Reverend James Koung Ninrew ("Reverend Ninrew").[28] Reverend Ninrew testified that he witnessed an attack that occurred in Bieh where "people were receiving foods and helicopter gunships came and attacked people; people were killed." [29]

The plaintiffs have also offered hearsay testimony from three individuals who ascribe control over

---

[28] Reverend Matthew Mathiang Deang ("Reverend Deang") was in Koch, a village several miles from Bieh, on the day of the attack. He described seeing airplanes and smoke rising from Bieh. Chief Thomas Malual Kap ("Chief Kap") was "displaced from Bieh as a result" of the Government attack, but does not testify to having seen the attack. Nyot Tot Rieth ("Rieth") lost her husband in the attack but did not witness it. In their Responsive Statement, plaintiffs cite to deposition testimony about the Bieh attack by James Abelee ("Abelee"), a security officer with the World Food Program from 1996 until 2000, but the excerpts from Abelee's deposition that the plaintiffs offer do not contain a description of the attack. Finally, the Additional Statement refers to a document that is missing from the plaintiffs' submissions.

[29] Reverend Ninrew testified that he believed the attack he witnessed occurred in 2000, but that the event he was describing was the same 2002 attack on Bieh described in the 2003 Complaint.

helicopters to "Talisman". Danhier, former chief of military intelligence for both the SSDF and the SPDF, testified [**46] that Sudanese intelligence officers were seconded to "Talisman" in Sudan to act as liaison officers between "Talisman" and the Sudanese armed forces. One of those officers told Danhier that they could get him the use of a helicopter through "Talisman."

[**47] James Pui Yak ("Yak"), a Sudanese witness for plaintiffs, reported that he traveled to Nimne, a community in Block 5A, with "someone from the company" who claimed he was assessing Nimne for development projects when, in fact, Yak suspected the purpose of the trip was military intelligence. [30] Plaintiff Chief Peter Ring Patai ("Chief Patai") reported that while he was in Nimne, "Talisman" employees came in a helicopter with a Government escort to have a community development meeting. Two days later "Government" [31] forces attacked Nimne.

James Gatduel Gatluak ("Gatduel"), a former commander [**48] in the SPLA, testified that his forces, as well as several other militia groups, attacked Nialdhiu in Block 5A on orders from

---

[30] Taylor charged that Dingley, Reading and Capeling told him that "community development is a great cover for security work." Taylor also complained that Dingley and Reading used identification describing their work as "Community Development." As already explained, Taylor's evidence is inadmissible.

[31] Chief Patai does not explain how he could identify the allegiance of the forces that attacked Nimne two days later.

"Talisman." The orders for the attack were delivered by a person named Alwad Alnof [32] at a meeting Gatduel attended in January 2002. Alnof said that the attack was to allow the "company to operate" and that the attack "was for the security of oil." After the fighting, Gatduel was transported to the battle scene in a helicopter that belonged to "Talisman." Neither Talisman nor TGNBV [*656] had any helicopters in the Sudan and there is no evidence that any Talisman or TGNBV employee had control over GNPOC equipment.

K. GNPOC Effort to Extend Operations "South of the River"

In April 2001, TGNBV's Capeling led a GNPOC "brainstorming" session on the question of whether GNPOC should try to develop a plan to explore the area in Block 4 "south of the river" that had [**49] not been previously explored. It appears that the river to which the April discussion refers cuts across the middle of the southerly portion Block 4.[33] In Capeling's opinion, something more than half of Block 4 was under Government control, but the southern portion of the Block was not and TGNBV did not consider it "secure." [34]

---

[32] The plaintiffs have not identified Alnof. There is no reason to believe he was an employee of either Talisman, TGNBV or GNPOC.

[33] The river is the Bahr-El-Arab, and can be seen on the map that shows Blocks 1, 2, 4 and 5A.

[34] The plaintiffs have not submitted Capeling's complete deposition, or even all of his testimony about the meeting. The

TGNBV's minutes of the April meeting reflect that the goal was "to sell the project as a peaceful one or not go at all," and suggest that a plan be designed to enter the area peacefully to ensure that the "local people welcome the arrival of the oil companies." They [**50] also reflect a report that prior efforts to cross the river to conduct seismic testing had been rebuffed by the military on the ground that it was unsafe. The minutes add that there was "little chance" that the terms of the EPSA would require the consortium to "give up" the area if it remained undeveloped, but that they could nonetheless show a willingness to develop the area. In contrast to this hope for a peaceful entry into the area, a response framed by a TGNBV security officer to questions posed by the Talisman Steering Committee in May 2001 noted that oil exploration operations in the southern area of Block 4 would be "impossible" without the aerial support provided by the Government's helicopters and the "threat they pose to the rebels."

Also in April 2001, Capeling learned of reports obtained by TGNBV security officers that the Government planned to move its military forces south of the river in the next dry season. Capeling didn't know the origin of the information or whether it was reliable, but raised the report with Hassan Ali ("Ali"), the Secretary General for Sudan's Ministry of Energy

---

brief passage they have offered on this issue leaves it unclear who the other attendees of the brainstorming meeting were and whether GNPOC ever reached a decision about exploring "south of the river."

and Mining,[35] who "seemed surprised and said he would raise it with the Minister. [**51] " Capeling's contemporary memorandum explains that such a movement by government forces would be "a very bad idea."

Two of the plaintiffs were displaced following April 2001 from homes located in what appears to be the area "south of the river." Both of the plaintiffs state that they were displaced by the "Government" although neither explains how they distinguished "Government" forces from other armed groups. These attacks did not involve helicopter gunships or bombers.

L. Talisman Denies Knowledge of Human Rights Abuses

As described above, before its acquisition of Arakis, Talisman had learned a great deal about the nature of the conflict in the Sudan and the Government's use of violence against non-Muslim, African civilians [*657] living in or near the oil concession areas. The TGNBV security reports and other sources kept Talisman [**52] apprised of the ongoing war effort during the time of its involvement in the Sudan.[36] Indeed, in meetings with Sudanese

---

[35] Capeling testified in his deposition that the Government "tried to establish that the Ministry of Energy and Mining be the focal point for communication with the Government."

[36] TGNBV was, naturally, well informed about conditions in the field. For example, in the Summer of 1999, Jemera Rone ("Rone"), who was researching human rights abuses in the Sudan, informed Capeling of his concern that forced

Government officials, including the Minister of Mining and Energy, who was the head of the Security Council,[37] Buckee advocated against the bombing of civilian targets and encouraged the Government to use oil money for development rather than military spending.

[**53] Talisman officials nonetheless made several public statements denying knowledge of human rights abuses in the oil concession area. In November 1999, Buckee wrote to Talisman shareholders that staff in the field "had not seen any evidence of forced displacements or relocation in our area of operations." In May 2001, Talisman spokesman Barry Nelson ("Nelson") denied that Talisman was aware of air attacks being launched from the Heglig and Unity airstrips. In April 2002, Nelson denied that there had been displacements of large numbers of civilians "within our concession area." Nelson declared that "during the time we have operated there, there have not been displacements."

---

displacements were occurring in the GNPOC concession area as part of an effort to establish a "cordon sanitaire" to aid in oil exploration activities.

TGNBV also hired a Sudanese lawyer, John Yor ("Yor"), to conduct an investigation into human rights abuses in the GNPOC concession that were disclosed in the Harker Report. Yor testified that "[a]lthough I received reports of displacement during my investigation, there were many causes of the displacement."

[37] As has been previously noted, the Government's Security Council was believed to control the Government forces that operated in the GNPOC concession.

M. The Plaintiffs' Injuries

There are fifteen plaintiffs,[38] including thirteen individuals. All of the individual plaintiffs assert that they were displaced, and most of them report being displaced several times and from several locations. Only five plaintiffs were displaced from settlements in the three blocks within GNPOC's concession during the time of Talisman's involvement in the Sudan.[39] Two of the five were displaced "south of the river" in 2001 and 2002.[40] Eight plaintiffs were displaced from settlements [**54] in Block 5A during the time of Talisman's involvement in the Sudan; Block 5A is the concession assigned to Lundin during the time TGNBV was a Consortium Member.[41]

---

[38] This number does not include Chief Mading Majik Kiir ("Kiir"), Yien Nyinar Riek ("Riek"), and Moris Bol Majok ("Majok"). Kiir is identified as a plaintiff in the Additional Statement but was not listed as a plaintiff in either the 2003 or 2006 Complaints. Majok's injuries are described in both the 2003 and 2006 Complaints and he is listed in both captions. Riek's injuries are also described in both complaints and he is listed in the caption of the 2003 Complaint but not the 2006 Complaint. Neither Majok or Riek is addressed by either party in the motion for summary judgment.

[39] Plaintiffs Stephen Kuina ("Kuina"), Luka Ayuol Yol ("Yol"), Puok Bol Mut ("Mut"), Chief Patai Tut ("Chief Tut"), and Chief Gatluak Chiek Jang ("Chief Jang").

[40] Plaintiffs Mut and Chief Tut.

[41] Plaintiffs Yol, Chief Jang, Rieth, Reverend Deang, Reverend Ninrew, Chief Kap, Chief Tunguar Kueigwong Rat ("Chief Rat") and Chief Patai.

[**55] The plaintiffs frequently state that they have been displaced by the "Government" without giving any explanation for how they distinguished the Government forces [*658] from other armed groups.[42] For nine of the plaintiffs, however, the link to the Government is clear. Those nine plaintiffs were displaced by at least one attack involving gunships and/or bombers, three in the GNPOC concession area, five in the Lundin concession area, and one in both concession areas.[43] Only plaintiffs Luka Ayuol Yol ("Yol"), Puok Bol Mut ("Mut"), and Chief Patai Tut ("Chief Tut") were displaced from the GNPOC concession area after October 1998 by gunship attacks. Two plaintiffs were physically injured in gunship attacks, one of which occurred within the GNPOC concession.[44] Finally, two plaintiffs were displaced before Talisman acquired Arakis. [45] The injuries suffered by each individual plaintiff follow, beginning with the three plaintiffs who were

---

[42] While Talisman argues that several of the plaintiffs were not actually displaced by the attacks that they describe because they owned other homes or chose to leave voluntarily, the plaintiffs are entitled to the inference that they were displaced and it was the attack that caused their displacement.

[43] Plaintiffs Kuina, Mut, and Chief Tut in Blocks 1, 2 & 4; Reverend Ninrew, Chief Rat, Chief Kap, Chief Jang and Chief Patai in Block 5A; Yol in both concession areas.

[44] Mut was shot by a gunship in an attack in Block 4. Chief Patai was injured by a bomb from an Antonov in Block 5A. Rieth's husband Joseph Thiet Makuac was killed in the attack on Bieh in Block 5A and she is bringing a claim on his behalf.

[45] Fatuma Nyawang Garbang and Stephen Hoth.

displaced from the GNPOC concession after October 1998 by gunship attacks: Yol, Mut, and Chief Tut. [**56]

Yol was captured and tortured by Government soldiers in 1999 in Biem, which is in Block 1. Yol was first displaced from Athonj[46] in November 1997, by Government troops and militia soldiers using tanks, bombers and gunships. He fled to Panlok, in Block 1, but was displaced one week later by helicopter gunships. In May 1999, he was displaced from Panchien in Block 1 by Government ground troops and bombers and gunships. Yol fled to Pagol in Block 1, which was attacked in March 2000 by Government soldiers, gunships and bombers. Yol fled Pagol for Nyador, which is in Block 5A. Nyador was attacked in February 2001 by bombers, and Yol fled [**57] to Chongonack, also located in 5A.

Mut is a member of the Parliament of Southern Sudan. Mut was displaced from a series of villages in Block 4 between 1998 and 2002[47] by the "Government" and allied militias. Three of the attacks that displaced Mut, attacks on Nooriak in 1998 and 1999 and Lara in 2002, included bombers

---

[46] The Court has been unable to locate Athnoj on any of maps provided by the parties.

[47] Mut was displaced from Mankien, Wangkei, Nooriak, Kotrial Bek, and Lara. In his response to defendant's interrogatory, Mut also claimed to have been displaced from Kualkony, Wicok and Boaw, but has offered no other evidence to support those claims.

and gunships.[48] Mut was shot in the right shoulder by a gunship during an attack at Lara in 2002.

[**58] Chief Tut is the Chief of Mayom County. Chief Tut was displaced from several villages in Block 4 in 2000 and 2001 by "Government" attacks.[49] Two of the displacements, from Mankien and Kernyang, [*659] were caused by attacks that included helicopter gunships and Antanovs. Chief Tut was shot in the right leg during an attack by Murahaleen militia near Kernyang in 2000. [50]

Two other plaintiffs were displaced from the GNPOC concession after October 1998: Stephen Kuina ("Kuina") and Chief Gatluak Chiek Jang ("Chief Jang"). Kuina is a nurse from the Nuer tribe, and a member of the Sudanese Parliament. He was displaced from Pibor in Block 4 in 1995 by the Government and Murahaleen. Kuina moved to Mankien, also [**59] in Block 4, where he was again displaced in October 1998 by fighting that included bombardment by Antanov bombers. Kuina attempted to stay in Ruathnyibol in Block 4 and built a shelter there, but was displaced by ground troops who did

---

[48] Mut testified that two of the attacks that displaced him, attacks on Nooriak in 1998 and 1999, included bombers and gunships. At his deposition in June 2004, Mut testified that he first saw a gunship in 2002.

[49] Chief Tut was displaced from Mankien, Kotrial Bek, Kernyang, Ngonp, Lara, Mayen Jur and Thiek. There is no evidence to explain how Chief Tut knew the attacks that displaced him were by Government forces.

[50] Murahaleen are an arab militia, made up of retired army officers, who often ride on horseback.

not wear uniforms and did not use vehicles. Upon leaving Ruathnyibol, Kuina took up residence in a displaced person's camp in Maper, which is outside of Unity State and the oil concession area. Kuina stayed in Maper until 2000. In the camp in Maper, there were shortages of food and medicine, but there were no violent attacks. Kuina attempted to return to Unity State in 2000, building shelters for himself and his family in a number of locations including Pibor, Tuchneina, Kerial, Byei, Lara, Toy, Tam and Mayen Jur, all in Block 4, but was displaced each time. Kuina chose these locations because he had heard that there were no helicopter gunships in those locations.[51]

[**60] Chief Jang is a chief of the Leek tribe. Chief Jang was displaced from Chotjara in Block 5A in July 1999, by bombers, gunships, and Government ground troops. Chief Jang went to Mankien in Block 4, but was displaced from Mankien by the "Government" in August 1999. Chief Jang returned to Chotjara in December 1999, was again displaced by "Government" forces in 2000, but returned again. [52] In October 2001, he was displaced from Chotjara for a third time by bombers, gunships and Government ground troops. Chief Jang returned to Chotjara yet again, and was displaced when Chotjara was

---

[51] Kuina describes being displaced by fighting from each of these places but not helicopter or gunship attacks.

[52] There is no evidence to establish how Chief Jang knew that the forces that attacked Mankien in August 1999 and Chotjara in 2000 were from the Government.

attacked in December 2002 by bombers, gunships, tanks and Government ground forces.[53]

[**61] Eight plaintiffs were displaced from communities in Block 5A. Two of those plaintiffs, Yol and Chief Jang, were also displaced from the GNPOC concession and their injuries have already been described above. Nyot Tot Rieth ("Rieth"), a member of the Nuer tribe, was displaced from a village near Leer in Block 5A in 2002 when her village was burned by "Arabs". Rieth did not see any vehicles or aircraft at the time of the attack. Rieth's husband was killed in a bombing attack in Bieh in Block 5A in 2002, and Rieth seeks compensation as his surviving spouse. Rieth was not present during the attack that killed her husband.

Reverend Matthew Mathiang Deang ("Reverend Deang") is a member of the [*660] Southern Sudan Parliament, the Presbyterian Church of Sudan and the New Sudan Council of Churches. Reverend Deang was displaced by a raid on Gany, which is located in Block 5A, in September 1999.[54] Reverend Deang

---

[53] Chotjara is located in the County of Nhialdiu. There is some confusion, based on Chief Jang's deposition testimony, about whether he was also displaced from the village of Nhialdu in Nhialdiu county. Chief Jang states in his May 2006 declaration that in his deposition, when he referred to Nhialdiu, he was referring to Nhialdiu county.

[54] Reverend Deang was not actually present for the raid on Gany. [**62] Reverend Ninrew is an education co-ordinator and pastor in the Presbyterian Church of Sudan. Reverend Ninrew was displaced from Koch in Block 5A in 1995 by a Government attack that included helicopters and bombers. He returned to Koch a month later and remained in Koch until

testified at his deposition in November 2003 that Gany was attacked by the Government. In his May 9, 2006 declaration he asserts that a militia group attacked Gany. Reverend Deang was also displaced from Koch in Block 5A in September 1999 by a "Government" attack.

Chief Tunguar Kueigwong Rat ("Chief Rat") is the Paramount Chief of the Leek Nuer. Chief Rat was displaced from Nhialdiu in Block 5A [55] in 2002 [56] by an attack by Government soldiers on foot, horseback and in vehicles, including tanks, with support from bombers and gunships. [**63]

Chief Thomas Malual Kap ("Chief Kap") is a member of the Nuer tribe. He was displaced from Koch, located in Block 5A, repeatedly from 1998 to 2003. Chief Kap was first displaced from Koch in 1998, by a Government attack involving gunships,

---

1998. In 1998, Reverend Ninrew left Koch after becoming aware of an attack on Liech, which is two hours from Koch. Reverend Ninrew could hear artillery, and could see and hear Antanovs and helicopter gunships during the attack on Liech. Reverend Ninrew went to Thornyor in Block 5A, where he was displaced later in 1998 by another attack by "Government of Sudan" forces.

[55] Nhialdu appears to be in Block 5A. This is consistent with Chief Rat's testimony. The Responsive Statement asserts that Nhialdiu is a name of an area that overlaps Blocks 5A and 4, but does not point to any evidentiary support for that assertion.

[56] In a February 2004 response to interrogatories, Chief Rat reported that he was displaced from Biel in 1998. In his July 2004 deposition, however, Chief Rat testified that he had voluntarily left Biel for Nhialdiu in 1999.

tanks and ground troops. After the 1998 attack, Chief Kap returned to Koch but was forced to flee by a Government attack that included helicopter gunships. After the second attack, Chief Kap again returned to Koch, only to be chased away by a third "Government" attack. After the third attack, Chief Kap fled to Pultuni. From Pultuni he was displaced to Mirmir, and then from Mirmir was displaced to Bieh. Chief Kap built shelters in each place but was forced to leave by Government forces. All three are in Block 5A. Chief Kap was displaced from Bieh by a Government attack during a food distribution by the World Food Program. In 2001, Chief [**64] Kap was shot in the foot by a Government soldier in an attack on Ngony in Block 5A.[57]

Chief Patai is the Paramount Chief of the Nuer tribe. Chief Patai and his community moved away from Duar in Block 5A in 2000 based on information that they would be attacked to make room for construction of an all-weather road.[58] He was displaced from Nimne in Block 5A in February 2002, by an attack by bombers and gunships. [*661] Chief Patai was injured in the attack on Nimne when he was hit in the left leg by shrapnel from a bomb and

---

[57] The soldiers in the attack on Ngony were supported by helicopter gunships.

[58] The decision was also based on reports of other Government attacks. In his response to defendant's interrogatories Chief Patai claims also to have been displaced from Duer in 1999, however plaintiffs have failed to submit evidence of this displacement

was hit in the head and right eye by wood from his house that was dislodged by a bomb.

[**65] Two plaintiffs were displaced before Talisman acquired Arakis: Stephen Hoth ("Hoth") and Fatuma Nyawang Garbang ("Garbang"). Hoth, who is presently a student in the seminary at Creighton University, moved to Khartoum in 1988 to attend school. In June 1998, Hoth attempted to travel to see his family in Pibor in Block 4. Hoth only got as far as Mayom in Block 4 where he was stopped by Government and militia forces. Hoth waited for two months for the opportunity to continue to Pibor. In August 1998, Hoth went to Heglig to look for work from the oil companies, and returned to Khartoum in September 1998. Hoth left Khartoum for Egypt in December 1998 because of his concern that he would be forced to join a militia group.

Garbang is a refugee living in Illinois and working as a translator and a tutor. Garbang was shot in the leg by a Government soldier in Leer in Block 5A in 1994, and driven from her home. Garbang attempted to reestablish a home in Leer three times between 1997 and 1999, but did not do so after being told that the area was "totally controlled."

There are two institutional plaintiffs. Plaintiff Nuer Community Development Services in USA ("NCDS") is a non-profit Minnesota [**66] corporation and alleges as damages its payments to displaced persons, although not to any of the named plaintiffs. NCDS is not an alien and may not bring suit under the ATS. *See Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995).* The plaintiffs do not contest dismissal of this claim.

The Presbyterian Church of Sudan ("Presbyterian Church") claims the loss of 64 churches due to Government attacks. The only evidence of its property loss comes through the testimony of three of the named plaintiffs, who describe damages to churches in thirteen different communities. Only one of the churches was damaged during an aerial attack, and that attack occurred in Block 5A.

Reverend Ninrew saw five damaged churches.[59] Only one church showed damage from an air attack, that church, which is located in Leer in Block 5A, was "destroyed by bombs."[60] Deang was told by Chief Rat about soldiers putting a man into a burning church in Nhiadliu in Block 5A but there is no evidence that the soldiers were from the Government. Chief Jang saw churches that "had been burned by Government of Sudan forces" in villages in both Block 4 and Block

---

[59] None of the churches identified by Ninrew were listed as having been damaged in the Presbyterian Church's response to defendant's interrogatories.

[60] The other four damaged churches were all built from thatch and had been either "severely damaged" or "burned." Reverend Ninrew attributes the damage to Government soldiers and allied militia but fails to explain how he knew who damaged the churches. Reverend Ninrew did not testify that he saw the attacks that damaged the churches. The other four churches were in Koch, Thornyor, Rier and Nyal. Koch and Thornyor are located in Block 5A and Nyal is in Block 5B, a concession block east of Block 5A. It is unclear whether Rier is in Block 5A or Block 4.

5A[61] but did not explain how he knew that it [**67] was Government forces that burned the churches.

[*662] [**68] **Discussion**

I. Motion for Summary Judgment

Summary judgment may not be granted unless all of the submissions taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Rule 56(c), Fed. R. Civ. P.* The moving party bears the burden of demonstrating the absence of a material factual question, and in making this determination the court must view all facts in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).* "A material fact is one that would affect the outcome of the suit under the governing law, and a dispute about a genuine issue of material fact occurs if the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party." *GlobalNet Financial.Com, Inc. v. Frank Crystal & Co., Inc., 449 F.3d 377, 381 (2d Cir. 2006)* (citation omitted). The parties' summary judgment submissions "shall set forth such facts as would be admissible [**69] in evidence," and when the moving party has demonstrated the lack of material factual dispute, the opposing party must

---

[61] The churches are in the villages of Chotjara, Wangrial, Riew, Biel, Bar Malual,were not identified in the Presbyterian Church's response to defendant's interrogatories

"set forth specific facts showing that there is a genuine issue for trial," and cannot rest on the "mere allegations" of the pleadings. *Fed. R. Civ. P. 56(e)*; *accord Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp., 302 F.3d 83, 91 (2d Cir. 2002).*[62] Thus, the evidence put forth by the non-movant to survive summary judgment must be admissible and the "principles governing admissibility of evidence do not change on a motion for summary judgment." *Raskin v. Wyatt, 125 F.3d 55, 66 (2d Cir. 1997)*; *see Lasalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp., 424 F.3d 195, 205-06 (2d Cir. 2005).*

[**70] Talisman has moved for summary judgment on the claims presented against it in the 2003 Complaint. These claims are that Talisman violated the customary international law relating to genocide, torture, war crimes, crimes against humanity, and the treatment of ethnic and religious minorities and their property, and that Talisman conspired with and aided and abetted its sole co-defendant, the Republic of Sudan, to commit those same violations of customary international law. The plaintiffs do not oppose the motion for summary judgment to the extent that it is addressed to Talisman's direct liability for violations of customary international law. Therefore, it is only necessary to address whether Talisman has shown that it is

---

[62] The plaintiffs urge a standard for summary judgment that would significantly reduce their burden, by among other things allowing them to rely on inadmissible evidence. Their application to alter the standard for a summary judgment motion is rejected.

entitled to summary judgment on the claims of conspiring with and aiding and abetting the Government.

A. Conspiracy

Talisman has moved for summary judgment on the claim that it conspired with the Government to commit violations of international law. Although the 2003 Complaint does not include a claim of conspiracy, it does include in its text an allegation that Talisman conspired with the Government to carry out a campaign of ethnic cleansing, including extrajudicial [**71] killing, war crimes, forcible displacement, military bombings and assaults on civilian targets, confiscation and destruction of property, kidnaping, rape, and enslavement against the non-Muslim, African Sudanese population living in and near the oil concession areas.

[*663] In opposition to the motion for summary judgment, the plaintiffs have described the conspiracy that they intend to prove at trial as follows. The conspiratorial agreement, formed between the Government and Arakis, was to clear the oil concession and surrounding area of all non-Muslim, African civilians. Talisman joined the conspiracy to displace residents with knowledge of its goal, and furthered its purpose principally by (a) designating new areas for oil exploration understanding that that would require the Government to "clear" those areas, (b) paving and upgrading the Heglig and Unity airstrips with knowledge that Government helicopters and bombers would use them in launching attacks on civilians, and (c) paying

royalties to the Government with the knowledge that the funds would be used to purchase weaponry.

Knowing participation in a forcible transfer of population, when part of a widespread or systematic attack [**72] directed against a civilian population, is a crime against humanity and a violation of customary international law. *See Presbyterian Church, 226 F.R.D. at 480-81.* The plaintiffs argue that, having joined the conspiracy to displace a population, Talisman is liable for the acts of all other conspirators taken in furtherance of the conspiracy, which it identifies as the "well-settled" law of conspiracy articulated in *Pinkerton v. United States, 328 U.S. 640, 646-47, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946).* It locates evidence that the *Pinkerton* doctrine is recognized in international law in a judgment of the trial chamber of the International Criminal Tribunal for Rwanda ("ICTR") in *Prosecutor v. Nahimana*, Case No. ITCR-99-52-T, Judgement and Sentence, P1045 (Trial Chamber, Dec. 3, 2003). Under the *Pinkerton* doctrine, a "defendant who does not directly commit a substantive offense may nevertheless be liable if the commission of the offense by a co-conspirator in furtherance of the conspiracy was reasonably foreseeable to the defendant as a consequence of their criminal agreement." *United States v. Bruno, 383 F.3d 65, 89 (2d Cir. 2004)* (citation [**73] omitted).

The plaintiffs misconstrue the reach of international law in at least two respects. First, the offense of conspiracy is limited to conspiracies to commit genocide and to wage aggressive war. Second, international law does not recognize a doctrine of

conspiratorial liability that would extend to activity encompassed by the *Pinkerton* doctrine.

The starting point for this discussion must be *Sosa, 542 U.S. at 692*. In *Sosa*, the Court explained that a claim under the "present-day law of nations" may form the basis for an ATS claim only to the extent it rests "on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" that Congress had in mind when it enacted the ATS. *Id. at 725*.

While international law has recognized since the prosecution of Nazi war criminals that liability can be based on participation in a conspiracy, *Presbyterian Church,* 244 F. Supp. 2d at 322, as of today international law applies the charge of conspiracy in only two circumstances: "conspiracy to commit genocide and common plan to wage aggressive war." *Hamdan v. Rumsfeld, 548 U.S. 557, 126 S. Ct. 2749, 2784, 165 L. Ed. 2d 723 (2006).* [63] Indeed, in [*664] *Nahimana*, the defendants were charged with conspiring to commit genocide. *Nahimana*, Judgement and Sentence at PP8-10, PP1040-55.

---

[63] In observing that the only conspiracy crimes recognized by "international war crimes tribunals" were "conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a concrete plan to wage war," *Hamdan* noted that the jurisdiction of such tribunals "often extends beyond war crimes proper to crimes against humanity and crimes against the peace." *Hamdan, 126 S. Ct. at 2784* (citation omitted).

A conspiracy to wage aggressive war was the first offense to be recognized in international law. Although the statute underlying the military tribunals following World War II was broadly worded and stated that "Leaders, organizers, instigators and accomplices participating [**75] in the formulation or execution of a common plan or *conspiracy* to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such a plan," in fact, the charges of conspiracy that were brought were limited to conspiracy to commit aggressive war and applied only to Hitler's senior leadership. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288 ("Nuremberg Charter") (emphasis supplied); *see also* Allison M. Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 Cal. L. Rev. 75, 116 (2005)* ("Danner, *Guilty Associations*"). The charge of conspiracy was rejected at that time as a basis for imposing liability for either crimes against humanity or war crimes. *Hamdan, 126 S. Ct. at 2784 & n.39*; *see also* Danner, *Guilty Associations*, at 116; International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, *reprinted in* [**76] 41 Am. J. Int'l L. 172, 221-24 (1947).

Since World War II, the only other context in which the charge of conspiracy has been recognized in international law has been when the object was to commit genocide. Brief for Specialists in Conspiracy

and International Law as Amicus Curiae Supporting Petitioner at 11, *Hamdan v. Rumsfeld, 548 U.S. 557, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006)* (05-184) ("Conspiracy Amicus"). None of the recently established international criminal tribunals (to wit, the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the ICTR or International Criminal Court ("ICC")), have been authorized to try defendants for the crime of conspiracy outside the context of genocide; both the ICTY and ICTR have been authorized by statute to try defendants for conspiring to commit genocide. *Id.*; *see also* Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 January 1994 and 31 December 1994, S. [**77] C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., art. 2, U.N. Doc. S/RES/955 (1994) ("ICTR Statute"); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., art. 4, U.N. Doc. S/RES/827 (1993) ("ICTY Statute"); *Presbyterian Church, 226 F.R.D. at 479.*

As of today, therefore, liability under the ATS for participation in a conspiracy may only attach where the goal of the conspiracy was either to commit

genocide [*665] or to commit aggressive war.[64] The plaintiffs no longer contend that Talisman conspired with the Government to commit genocide; they have never claimed that it conspired to commit aggressive war. As described above, they contend that Talisman joined a conspiracy to commit a crime against humanity, specifically, a widespread and systematic attack on a civilian population to displace it forcibly.[65] As a result, the defendants' motion for summary judgment on the conspiracy claim is granted. [**78]

It should also be noted before leaving this subject, however, that even if the plaintiffs continued to press a claim that Talisman conspired to commit genocide, they would not be able to rely on the *Pinkerton* doctrine to impose liability on Talisman. "The Anglo-American concept of conspiracy was not part of European legal systems," *Hamdan, 126 S. Ct. at 2784*

---

[64] In *Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005)* (per curiam), the Eleventh Circuit recognized conspiracy liability under the ATS for a number of violations of international law including crimes against humanity. *Id. at 1159.* As the plaintiffs point out in their brief, the Eleventh Circuit erred in doing so by drawing on domestic law, and not international law. Because this Court continues to believe that international law must supply the substantive law for plaintiffs' claims it declines to follow *Cabello.*

[65] To the extent that the plaintiffs' brief in opposition to this motion can also be read to argue that the plaintiffs believe that they have evidence to show the intentional targeting of civilians, that conduct may constitute a war crime. For the reasons already explained, however, Talisman could not be charged under the ATS with conspiring to participate in that war crime.

(citation omitted), at the time of the Nuremberg tribunals, and has never found acceptance in international law.[66] While both the ICTY and ICTR Statutes recognize conspiracy as a mode of imposing liability for the crime of genocide, neither statute contains language supporting the application of the *Pinkerton* principle. Thus, Talisman could [**79] not be held liable under the ATS for the conduct of a co-conspirator merely because that conduct was foreseeable.[67]

[**80] Talisman has also been sued in its capacity as a successor to Arakis. This appears to relate to the plaintiffs' contention that the conspiracy to displace non-Muslim Africans originated in an agreement between Arakis and the Government, and that when Talisman acquired Arakis, it joined the conspiracy and became liable for conspiratorial acts committed by Arakis and the Government before the

---

[66] The Nuremberg Charter included language that embraced the *Pinkerton* principle, Nuremberg Charter, art. 6, but the International Military Tribunal ("IMT") which implemented that charter refused to embrace the *Pinkerton* principle. *See* Conspiracy Amicus at 15 (noting that the pattern of the convictions of Rudolph Hess is evidence that the *Pinkerton* principle was not applied by the IMT); *see also* Danner, *Guilty Associations* at 116 (observing that the IMT judges "endorsed a restrictive notion of conspiracy").

[67] The plaintiffs cite to *Nahimina* as evidence of the ICTR's adoption of the *Pinkerton* principle, but do not point to any passage in the 240-page decision that supports this view. The passage they do quote addresses whether an agreement may be inferred from circumstantial evidence, which is a separate and uncontroversial proposition. *See Nahimina*, Judgement and Sentence at P1045.

acquisition. For the reasons already explained, the conspiracy claim must be dismissed as well to the extent it is brought against Talisman as a successor to Arakis.

B. Aiding and Abetting

Talisman has also moved for summary judgment on the plaintiffs' sole remaining claim, the claim that Talisman aided and abetted the Government in committing[*666] genocide, torture, war crimes, and crimes against humanity. This Court has previously referred to the Ninth Circuit's finding that there is a "settled, core notion of aider and abettor liability in international law" that requires a plaintiff to show "knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime." *Talisman, 374 F. Supp. 2d. at 340* (citing *Doe I v. Unocal Corp., 395 F.3d 932, 951 (9th Cir. 2002)).* [**81] To address the issues presented by Talisman's motion, it is appropriate to set forth the elements of aiding and abetting liability under international law with more precision.

1. *The Elements of Aiding and Abetting Liability Under International Law*

The ICTY, ICTR and ICC each impose liability on individual defendants for aiding and abetting the commission of a crime. ICTY Statute at 7(1); ICTR at 6(1); Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, art. 25(3), U.N. Doc. A/CONF.183/9 (1998) ("Rome Statute"). For example, the ICTY Statute provides

that a "person who planned, instigated, ordered, committed or otherwise *aided and abetted* in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime."[68] ITCY Statue at art. 7(1) (emphasis supplied).

The Rome Statute provides that:

> *Article 25*
>
> Individual Criminal Responsibility
>
> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a [**82] crime within the jurisdiction of the Court if that person:
>
> ...
>
> (c) For the purpose of facilitating the commission of such a crime, *aids, abets or otherwise assists* in its commission or its attempted commission, including providing the means for its commission.
>
> ...
>
> *Article 30*

---

[68] Articles 2 through 5 refer to the specific crimes described in the ITCY Statute, to wit, Grave breaches of the Geneva Conventions of 1949, Violations of the laws or customs of war, Genocide, and Crimes against humanity. ICTY Statute at art. 2-5.

Mental Element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed *with intent and knowledge*.

2. For purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Rome Statue at art. 25, 30 (emphasis supplied).

[**83] The Appeals Chamber of the ICTY has described the *actus reus* of aiding and abetting as requiring that the accused carry [*667] out "acts

specifically directed[69] to assist, encourage or lend moral support to the perpetration of a certain specific crime" and that this support have "a substantial effect upon the perpetration of the crime." *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgement, P102(i) (App. Chamber, Feb. 25, 2004) (emphasis supplied). The mental element of the crime of aiding and abetting or *mens rea* is defined as "knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal." *Id.* at P102(ii). To have a "substantial effect" it is not necessary to show that assistance constituted an indispensable element of the crime, only that "the criminal act most probably would not have occurred in the same way had not someone

---

[69] The use of the phrase "specifically directed" in *Vasiljevic*, Feb. 25 Judgement, at P102(i), may have been designed to address the issue of whether assistance must be "direct". In *Prosecutor v. Tadic*, Case No. 94-1-T, Opinion and Judgment (Trial Chamber, May 7, 1997), the ICTY trial court had conducted an extensive survey of the international precedent, focusing particularly on the Nuremberg trials, and had concluded that assistance which "directly and substantially affected the commission" of an offence would support aiding and abetting liability. *Id.* at P692. At least one trial chamber opinion has declined to require that assistance be both "direct" and "substantial", concluding that "the use of the term 'direct' in qualifying the proximity of the assistance and the principal act to be misleading as it may imply that assistance needs to be tangible, or to have a causal effect on the crime." *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgement, P232 (Trial Chamber, Dec. 10, 1998). Requiring that the acts of the aider and abettor be "specifically directed" to assist the principal requires that the action of the aider be deliberate and intentional without creating confusion about the practical impact of the action.

acted in the role the accused in fact assumed." *Talisman, 244 F. Supp. 2d. at 324* (citing *Prosecutor v. Tadic*, Case No. 94-1-T, Opinion and Judgment, P688 (Trial Chamber, May 7, 1997)).

[**84] The application of aiding and abetting liability is not novel. The theory of liability was used following World War II, and contemporary courts still draw on that precedent, citing among other cases the accusation made by the British Military against three individuals for supplying the poison gas used for the extermination of allied nationals interned in concentration camps. The prosecution was required to prove that the defendants knew that the gas would be used to kill human beings. *See Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgement, P222 (Trial Chamber, Dec. 10, 1998); *Tadic*, May 7 Opinion and Judgment at P680.

Far more recently, in *Vasiljevic*, the Appeals Chamber for the ICTY found the appellant guilty of aiding and abetting the crimes of murder and persecution based on his participation in the murder of five Muslim men at the Drina River in Bosnia and Herzegovina in 1992. While armed, the appellant escorted the victims to the river bank and prevented their escape before they were shot and killed by others. *Vasiljevic*, Feb. 25 Judgement at PP1, 134, 147. The Appeals Chamber found that the evidence established that the appellant knew that the principal [**85] perpetrators of the crimes intended to commit the crimes of murder and discrimination, and that armed with that knowledge he assisted the commission of the crimes in a way that had a "substantial effect upon the perpetration of the

crimes" at a time when he was "fully aware that his participation assisted the commission" of the crimes. *Id.* at PP134-35, 142-43 (citation omitted).

The articulation of aiding and abetting liability in *Vasiljevic* has been adopted by the Appeals Chamber of the ICTY in subsequent decisions. See Prosecutor v. [*668] *Kvocka*, Case No. IT-98-30/1-A, Judgement, P89 (App. Chamber, Feb. 28, 2005), and *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgement, P45 (App. Chamber, July 29, 2004). It also finds its roots in prior Appeals Chambers' decisions. *See Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, P163 (App. Chamber, Mar. 24, 2000); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement, P229 (App. Chamber, July 15, 1999).[70]

[**86] The international law of aiding and abetting liability closely parallels federal criminal law. Under federal law, a prosecutor must show the presence of two separate mental elements: knowledge and intent. Criminal culpability exists under federal law where it is shown that "the defendant knew of the crime, and that the defendant acted with the intent to contribute to the success of the underlying crime." *United States v. Reifler, 446 F.3d 65, 96 (2d*

---

[70] This Court has already observed that the Appeals Chambers of both the ICTR and ICTY are "endowed with the power to review and reverse Trial Chamber decisions for errors of law" and that where there are "inconsistencies between Trial Chamber decisions and Appeals Chamber decisions, decisions of the Appeals Chamber are authoritative." *Presbyterian Church, 374 F. Supp. 2d. at 340.*

Cir. 2006); see also In re South African Apartheid Litig., 346 F. Supp. 2d 538, 551 n.14 (S.D.N.Y. 2004). The prosecutor must also show that the defendant's efforts "contributed towards" the success of the criminal venture. *Reifler, 446 F.3d at 96* (citation omitted).

Aiding and abetting liability is a specifically defined norm of international character that is properly applied as the law of nations for purposes of the ATS. *See Sosa, 542 U.S. at 725.* To show that a defendant aided and abetted a violation of international law, an ATS plaintiff must show:

> 1) that the principal violated international law;
> 2) that the defendant knew of the specific violation; [**87]
> 3) that the defendant acted with the intent to assist that violation, that is, the defendant specifically directed his acts to assist in the specific violation;
> 4) that the defendant's acts had a substantial effect upon the success of the criminal venture; and
> 5) that the defendant was aware that the acts assisted the specific violation.

The plaintiffs have not identified sufficient evidence to raise a material question of fact that Talisman can be found liable for aiding and abetting the Government in the commission of genocide, crimes against humanity, or war crimes, because among other things they have not identified evidence that Talisman itself

performed any act that could be construed as substantial assistance to the Government in its violation of international law. After briefly addressing the genocide claim, the following discussion will describe the elements of the remaining two claims and the plaintiffs' evidence that Talisman knew of the Government's criminal activity. The discussion of the intent and substantial assistance elements follows. At the conclusion, there is a discussion of the causation issues which affect each claim.

2. *Genocide*

[**88] The plaintiffs' brief in opposition to the summary judgment motion largely ignores the claim that Talisman aided and abetted genocide. They do not contend that Talisman acted with intent to or was aware that its acts did assist genocide. Instead the plaintiffs focus their energies on the claims that Talisman aided and abetted crimes [*669] against humanity and war crimes. The plaintiffs essentially confine their discussion of genocide to a dispute about the admissibility of a congressional finding of genocide. A brief discussion of the genocide claim will therefore suffice.

Genocide is defined as:

> any of the following acts committed with intent to *destroy*, in whole or in part, *a national, ethnical, racial or religious group*, as such:

> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

Presbyterian Church, 226 F.R.D. at 478 [**89] (citing to Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, 102 Stat. 3045, 3045, 78 U.N.T.S. 277, 280) (emphasis supplied); *see also Kadic, 70 F.3d at 241.* The intent element of genocide may be inferred from "evidence of a perpetrator's knowing participation in an organized or extensive attack on civilians." *Presbyterian Church, 226 F.R.D. at 479* (citation omitted).

The parties dispute whether the plaintiffs have provided any admissible evidence that the

Government was committing genocide in the southern Sudan.[71] There is no evidence that any international body has found that genocide has occurred in southern Sudan, nor that the United States Department of State has made such a finding. The plaintiffs rely exclusively on the Congressional finding of genocide in the Sudan Peace Act, Pub. L. No. 107-245, 116 Stat. 1504 (codified at 50 U.S.C. § 1701). Talisman argues that as a conclusion of law, unsupported by a factual investigation, the "finding" of genocide is not admissible under *Rule 803(8)(C), Fed. R. Evid. See Gentile v. County of Suffolk, 926 F.2d 142, 148 (2d Cir. 1991).* [**90]

The plaintiffs also have difficulty showing that Talisman was on notice that genocide was occurring during the period of its investment. Their best evidence appears to be a conversation in 1998, before the investment, in which the former head of Arakis security told Talisman that it was his belief that if Talisman entered Sudan "the exploitation of the oil fields would be successful," that the resulting oil revenues would tip the military balance in the Sudan in favor of the Government, and that as a result "there would be no hope for the survival of the southern Christian community because they would not have resources to defend themselves." To the extent that this was understood at the time as a statement about the physical survival of a population, then this may be construed as notice of a

---

[71] Many international bodies have labeled the Government's conduct in western Sudan, known as Darfur, as genocide. This lawsuit does not allege any complicity in those acts.

risk that the Government would engage in a [**91] campaign of genocide.[72]

The plaintiffs have not pointed to evidence that Talisman knew or should have understood during the period of its investment in oil development in the southern Sudan that the Government was engaged [*670] in genocide, as opposed to the forcible displacement of a population, for example. A claim of genocide is an extremely serious matter, and to survive summary judgment on such a claim requires evidence not only that genocide was occurring but also evidence that reasonably supports an inference that Talisman understood that to be so and understood that the acts performed by Talisman that the plaintiffs contend constituted substantial assistance [**92] were acts that facilitated genocide and were intended by Talisman to do so. While issues of knowledge and intent are exquisitely fact intensive inquiries, and not typically appropriate for resolution on summary judgment, it is nonetheless incumbent on a plaintiff to point to evidence from which a reasonable juror could infer those states of mind. The plaintiffs have pointed to no such evidence, circumstantial or otherwise. Talisman is entitled to summary judgment on the claim that Talisman aided and abetted genocide.

---

[72] The plaintiffs have shown that Talisman was aware of reports in 1999 that the National Islamic Front, the ruling party in Sudan, was committed to a policy of jihad that included "enforced Arabization" of citizens in the south. The plaintiffs have not addressed whether jihad or enforced Arabization refers to the cultural or physical eradication of a group.

3. *Crimes Against Humanity*

Crimes against humanity include murder, enslavement, deportation or forcible transfer,[73] torture, rape or other inhumane acts, committed as part of a widespread and systematic attack directed against a civilian population. *Presbyterian Church, 226 F.R.D. at 480-81.* A widespread attack is one conducted on a large scale against many people, while a systematic attack is an organized effort to engage in the violence. *Id. at 481* (citing to *Prosecutor v. Kordic*, Case No. IT-95-14/2-A, Judgment, P94 (App. Chamber, Dec. 17, 2004)).

[**93] Counsel for the plaintiffs have not specifically identified which crime against humanity they are pursuing with this litigation, preferring instead simply to refer the Court to all of their evidence. The plaintiffs have presented no evidence that any plaintiff was enslaved, deported, or raped.[74] While one plaintiff has alleged torture, the plaintiffs have submitted no evidence to permit a finding that the torture was part of a widespread, systematic campaign. None of the plaintiffs is a murder victim

---

[73] The ICTY statute lists deportation, not forcible transfer, as a crime against humanity. *See* ICTY Statute art. 5. Forcible transfer is included, however, as a crime against humanity under the ICTY statute within the category designated as "other inhumane acts." *See Prosecutor v. Milosevic*, IT-02-54-T, Motion for Judgement of Acquittal, P41 (Trial Chamber, June 16, 2004).

[74] In their Responsive Statement, the plaintiffs explain that they asserted enslavement and rape on behalf of the class only.

and suing as the estate of the deceased.[75] On the other hand, each of the individual plaintiffs contends that he or she was forcibly displaced from concession lands.

[**94] The plaintiffs might face significant evidentiary challenges at trial in proving that their displacements were part of a widespread and systematic Government campaign directed against civilians during the period October 1998 to March 2003, the dates of Talisman's investment. The most compelling evidence relates to an earlier period of time. Some of the plaintiffs' difficulties in this regard will be discussed below in connection with the issue of causation.

There is evidence, however, that Talisman was informed that Government forces forcibly displaced civilian populations to create a buffer zone around oil development [*671] sites. Three examples of such evidence will suffice. Talisman officials were informed in the summer of 1998 that the Sudanese military removed local inhabitants in proximity to oil work sites. A 1999 TGNBV report describes the Government's practice of creating a zone around the oil facilities in which no settlement or commerce was allowed. An 2002 TGNBV security report describes residents being "encouraged" to leave the area around

---

[75] One plaintiff seeks damages due to the death of her husband. This plaintiff cannot provide eyewitness testimony of the circumstances under which her husband died. Talisman disputes in any event her legal right to recover compensation for that loss.

Heglig, purportedly to provide security for the oil operations.[76]

[**95] **4. *War Crimes***

The canonical statement of war crimes as "armed conflicts not of an international character" is provided by common article 3 of the Geneva Conventions

> *Persons taking no active part in the hostilities...shall in all circumstances be treated humanely without any adverse distinction founded on race, colour, religion or faith*, sex, birth or wealth, or any other similar criteria. To this end, *the following acts are* and shall remain *prohibited* at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) *violence to life and person*, in particular murder of all kinds, mutilation, cruel treatment or torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

---

[76] The report that made this observation was written by Reading in June 2002. While there is no evidence about who received this report, some security reports were sent to Talisman officials.

> (d) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all guarantees which are recognized as indispensable by civilized peoples.

Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Feb. 2, 1956, 6 U.S.T. 3114, 75 U.N.T. [**96] S. 31, art. 3 (emphasis supplied); *see also Kadic v. Karadzic, 70 F.3d 232, 242-43 (2d Cir. 1995).*[77]

The plaintiffs contend that the Government's military attacks on civilians in undefended villages constitute war crimes. Talisman does not disagree, but notes that an individual plaintiff must show that the tort was committed in the course of an armed conflict. *See Kadic, 70 F.3d at 243.*

Plaintiffs have introduced evidence from which the plaintiffs may argue that [**97] Talisman was informed that Government forces were targeting civilian populations. Whether the plaintiffs have

---

[77] Plaintiffs urge that the second of the two Protocols Additional to the Geneva Convention, commonly referred to as Protocol II, also be considered as a source of war crimes. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 609. *See also Kadic, 70 F.3d at 243 n.8; Prosecutor v. Tadic*, IT-94-1, Decision on Interlocutory Appeal on Jurisdiction, AP 117 (Oct. 2, 1995).

evidence that each of the plaintiffs was displaced or otherwise injured in a Government attack directed against civilians will be discussed in connection with issues of causation.

5. ***Substantial Assistance***

Plaintiffs argue that Talisman provided substantial assistance in the commission of each of these crimes through the following acts: 1) upgrading the Heglig and Unity airstrips; 2) designating areas "south of the river" in Block 4 for oil exploration; 3) providing financial assistance [*672] to the Government through the payment of royalties; (4) giving general logistical support to the Sudanese military; and (5) various other acts.

The activities which the plaintiffs identify as assisting the Government in committing crimes against humanity and war crimes generally accompany any natural resource development business or the creation of any industry.[78] Many countries, including on occasion our own, have encouraged investment by domestic corporations in foreign countries that have abysmal human rights records based on the belief that economic

---

[78] Canada as a matter of national policy holds out the promise of the reinstatement of support services for Canadian companies engaged in trade with the Sudan as an incentive for the Sudan to resolve its internal disputes peacefully, believing that engagement and economic development of the country is the best route to bringing peace and the rule of law. *See Presbyterian Church, 2005 U.S. Dist. LEXIS 18399, 2005 WL 2082846, at *1, *6* (describing diplomatic note from the Embassy of Canada to the United States Department of State and distinguishing oil exploration from trade).

development will bring with [**98] it political development, respect for the rule of law and the observance of human rights.

The acts which the plaintiffs identify as acts of substantial assistance have no necessary or obvious criminal component. For instance, designating acreage for exploration is an essential component of any exploration for and development of natural resources. Upgrading airstrips is critical to the safe delivery of supplies for and transport of personnel. Similarly, [**99] paying royalties is customary, as is the payment of taxes and duties.[79] Thus, the plaintiffs' theories of substantial assistance serve essentially as proxies for their contention that Talisman should not have made any investment in the Sudan, knowing as it did that the Government was engaged in the forced eviction of non-Muslim Africans from lands that held promise for the discovery of oil.

It may be that this issue is best analyzed as one of intent, and therefore, that it is a purely factual matter that is most appropriately resolved at trial. Since liability for aiding and abetting will only lie where a jury finds that the defendant engaged in an act that provided substantial assistance to the wrongdoer with both knowledge of the criminal enterprise and *intent* to further that goal, a plaintiff must be able to show that the business activity, which would otherwise appear to be a normal [**100] component of the conduct of a lawful business, was in

---

[79] Any business enterprise in or trade with the Sudan would no doubt have contributed to the Government's coffers.

fact specifically directed to assist another to commit a crime against humanity or a war crime. This is a demanding burden when otherwise lawful acts are designated as the acts which provide substantial assistance, and there is no direct evidence of improper intent and no direct participation in the criminal act.

The plaintiffs essentially argue that Talisman understood that the Government had cleared and would continue to clear the land of the local population if oil companies were willing to come to the Sudan and explore for oil, and that understanding that to be so, Talisman should not have come. They have no evidence that Talisman (or TGNBV or GNPOC) participated in any attack against a plaintiff and no direct evidence of Talisman's illicit intent, so they wish to argue that Talisman's knowledge of the Government's record of human rights violations, and its understanding of how the Government would abuse the presence of Talisman, is a sufficient basis from which to infer Talisman's illicit intent when it designated areas for [*673] exploration, upgraded airstrips or paid royalties. Against this background, we turn now to the factual [**101] deficiencies in the plaintiffs' evidence that Talisman contends require summary judgment in its favor with respect to each of the acts that the plaintiffs have identified as Talisman's substantial assistance to the Government's violations of international law.

a. ***Developing the Unity and Heglig Airstrips***

The plaintiffs contend that Talisman substantially assisted the Government's crimes by upgrading and

improving two airstrips, knowing that the Government would use the improved airstrips to launch attacks on civilians. The plaintiffs do not contend that Talisman either knew of any specific Government attack on civilians before it occurred or did anything to support or encourage a specific attack.

There is evidence that the Government used the Heglig and Unity airstrips to violate international law by targeting and displacing civilians.[80] Nine plaintiffs have described being displaced and/or injured by helicopter and bomber attacks. At least some of the plaintiffs are entitled to rely on circumstantial evidence that the flights that made those attacks originated from the Heglig and Unity airstrips. The airstrips provided a base of operations that was close to some of the Government's [**102] targets, allowing them to reach a wider range of locations, carry less fuel, and fly more frequent missions. The plaintiffs contend therefore that any improvements and upgrades to the airstrips assisted the Government substantially.

The two airstrips, however, were operated by GNPOC. There is no evidence that Talisman had any role in operating the airstrips, nor is there any evidence that Talisman had any role in upgrading the

---

[80] Some of the evidence on which the plaintiffs properly rely to show that Talisman was informed of a problem, becomes hearsay when the plaintiffs try to use it to prove that the problem was in fact occurring. For instance, to the extent that a TGNBV security report is based on hearsay, it may not be used to show the occurrence of the incidents described in it.

runways or in any other improvements to the airstrips.[81]

[**103] To impose liability on Talisman, plaintiffs rely on a single passage from undated handwritten notes, which they identify as being authored by Capeling,[82] in which the author proposes that the military be encouraged to relocate from Heglig to Unity airstrip so that it could establish "a stronger presence further south with better infrastructure and support." The notes add, "[t]hey need a better base." These notes do not provide the missing link that would allow a jury to find that Talisman upgraded and improved the Unity airstrip, much less that it did so with the knowledge and intention that the Government use the airstrip to launch attacks on civilians.

Assuming that the plaintiffs can show that Capeling is the author of the notes, that would show that the general manager of TGNBV considered such a proposal. The plaintiffs have not pointed to any evidence that TGNBV (a 25% participant in GNPOC) decided to make the proposal, that it presented [**104] the proposal to GNPOC, or that GNPOC adopted it. As already described in this Opinion,

---

[81] Decisions to make capital improvements to oil facilities were made through Authorizations For Expenditures (AFE) forms that were circulated to all GNPOC members for approval. The plaintiffs have not pointed to any AFE form addressed to improvements of the airstrips. In any event, TGNBV, and not Talisman, was a member of GNPOC.

[82] The plaintiffs point to no evidence that Capeling is the author.

there is evidence [*674] that the military did move its bombers and helicopters to Unity airstrip after it was upgraded, but no evidence that this was due to a request from GNPOC.

Taken in the light most favorable to plaintiffs, the evidence shows that the Sudanese military was responsible for the security of GNPOC personnel and operations in an area torn by armed conflict, that GNPOC was responsible for the infrastructure within the concession, and that GNPOC and the Consortium Members understood both that the military would take advantage of any infrastructure improvements, including upgraded airstrips, in planning their operations, and that the military engaged in not just defensive operations from airstrips, but also offensive operations. This is not sufficient to raise a question of fact as to whether *Talisman* upgraded the airstrips, much less that it specifically directed that activity to assist the Government to engage in offensive military operations against civilians rather than defensive operations or offensive operations against rebel forces.

Although not articulated by the plaintiffs, [**105] there is another argument that they may wish to make at trial. They may contend that Talisman is liable for the upgrading of the airstrips because TGNBV would not have made the suggestion that the airstrips be upgraded and that the military move to the Unity airstrip without Talisman approving the decision.[83] Again, however, there are simply too

---

[83] As will be discussed later in this Opinion, the 2003 Complaint did not plead an agency theory of liability to hold Talisman liable for TGNBV's actions, and the attempt to add

many evidentiary gaps to impose liability on this theory either. The plaintiffs have not pointed to evidence that TGNBV made the proposal, much less that it did so after discussion with Talisman. The plaintiffs have not even shown precisely which TGNBV security reports went to Talisman. As significantly, the documents on which the plaintiffs rely most heavily in opposing summary judgment, show that on those occasions on which Talisman did try to act in the Sudan to affect security matters, its efforts had to be made by going through GNPOC and that those efforts were often rebuffed. To give but a few examples, the Government failed to respond to GNPOC requests, made at TGNBV's behest, to stop using Heglig for bombing runs in 1999; GNPOC's Mohktar refused to ask the Government to move flight operations to Rubkona in the spring of 2001; and [**106] a TGNBV report in 2001 addressing the military use of the airstrips noted that the Government had "strung this along" despite "on occasions telling us what we want to hear."

In sum, the plaintiffs have not shown that Talisman took any steps to upgrade either the Heglig or Unity airstrips or that it did so with the intent that the Government of the Sudan would use the airstrips to launch attacks on civilians. This theory of aiding and abetting liability fails.

b. ***Exploring "South of the River"***

The plaintiffs contend that Talisman "furthered" the conspiracy by designating areas for oil exploration outside Blocks 1 and 2 and "south of the

---

such a theory through the 2006 Complaint fails.

river", knowing that this designation "required" Government security forces to clear the area of non-Muslim, African civilians. According to the plaintiffs, [**107] the essence of the crime was the designation of an area for oil development that was outside the territory already under Government control. The plaintiffs essentially rely on two pieces of evidence: brief deposition testimony by TGNBV's Capeling and a single April 2001 e-mail with minutes of a brainstorming [*675] session among Consortium Members. Two of the plaintiffs were displaced from the area south of the river following April 2001 by what they identify as Government attacks.

Plaintiffs have failed to point to any evidence that GNPOC ever adopted a plan to explore "south of the river", or that the Sudanese military engaged in any clearance activity because GNPOC had communicated such an intention to the Government. In any event, if an area south of the river were designated for exploration, that decision would have been made by GNPOC, not Talisman. Even as to the preliminary discussions to which the plaintiffs point, they have again failed to connect these preliminary discussions to Talisman. Capeling was the general manager of TNGBV; the plaintiffs have not even pointed to evidence from which one could infer that Capeling was instructed by Talisman to develop a plan to explore "south [**108] of the river."

Because there is no evidence that Talisman had any involvement in a plan or proposal to explore south of the river, it is unsurprising that there is also a complete absence of evidence of Talisman's illicit intent in this regard. With respect to TGNBV and

GNPOC, the evidence reflects a desire to expand exploration activities only if it could be done peacefully, a prospect that some viewed as unlikely.

c. Financial Assistance to the Government

Plaintiffs contend that Talisman aided and abetted the Government by paying royalties to the Sudanese Government, which the Government used to purchase large amounts of new weaponry that it turned against the plaintiffs. Plaintiffs principally rely on an expert report submitted by military experts Sherwood Goldberg and Edward O'Connor ("Goldberg Report") to establish the financial link between oil revenues and military expansion.[84] The Goldberg Report asserts that the Government earned $ 800 million in oil revenue in 2002 and that it came largely from GNPOC's extraction of oil and payment of royalties. This same data is presented in the report by plaintiffs' expert Johnson, which identifies the source as the Human Rights [**109] Watch report *Sudan, Oil, and Human Rights* ("HRW Report"). The plaintiffs have not offered the HRW Report as evidence.[85]

Plaintiffs have failed to identify any admissible evidence on the amount or source of royalty payments to the Government, the amount spent by the Government on weapons procurement, or the timing

---

[84] Plaintiffs withdrew their designation of Edward O'Connor as an expert at his deposition on March 2, 2006.

[85] Talisman has submitted a two page excerpt from the HRW Report to support its motion to exclude the Goldberg Report.

of those expenditures.[86] While Goldberg may [*676] be able to offer his expert opinion on the importance of the financial relationship to the military's effectiveness in the south, his opinion is not evidence of that relationship.

[**110] The plaintiffs have evidence from which a jury could find that Talisman believed that the Government used oil revenues to buy armaments, even if Talisman did not have any direct evidence or knowledge of that fact. It is reasonable to assume that evidence exists, even if the plaintiffs have not marshaled it for this motion, that Talisman's revenue stream from its investment in the Sudan was reduced because of royalty payments made by GNPOC or TGNBV, and that Talisman's audit procedures accounted for those reductions. It is also reasonable to assume, even if the plaintiffs have not succeeded in gathering admissible evidence to show when it

---

[86] Plaintiffs present a few documents that reflect different individuals' views about the connection between oil revenues and military spending, but do not fill the evidentiary gap with competent evidence. An email from a Talisman employee seconded to GNPOC, sent to his sisters, speculates that "oil will just buy more military power to use against the south" and "[n]obody can tell me that this oil is not buying more military power." A 2001 Security Assessment by TGNBV security officer Dingley describes a possible increase in military spending by the Government.

A TGNBV security report from the summer of 2002 states that "the nature of the conflict has changed substantially in the last 3 and half years. What was an essentially low-tech bush war has changed at least for the [Government]. The goose is now far stronger and has a distinct technical superiority over the rebels."

occurred, that the Government spent money to buy helicopters and cargo planes, crudely convert the latter to bombers, and buy munitions. Nonetheless, even if the plaintiffs had pointed to evidence regarding each link in this chain of evidence, the issue would remain whether they had identified evidence sufficient to support a finding that when Talisman (or TGNBV or GNPOC) paid royalties, it "specifically directed" those payments to the Government's procurement of weaponry to target civilians and displace them.

Knowledge that such attacks had occurred [**111] and would likely occur again simply does not provide circumstantial evidence of an intent to assist in those attacks by the payment of royalties. The plaintiffs have pointed to no evidence that Talisman urged that such attacks be made. Quite to the contrary, the evidence to which the plaintiffs have directed the Court's attention on this motion includes several examples of Talisman speaking either with the head of GNPOC security or the Government to discourage such attacks and advocate that oil revenues be spent for development. Moreover, the Government was responsible for the security of GNPOC oil operations in the midst of a civil war. Defensive military actions, and even offensive campaigns not directed at civilians, would not be a violation of international law. The connection between the payment of royalties and the Government attacks on civilians is simply too indirect to permit the payment of royalties itself to serve as circumstantial evidence of an intent to assist in the Government's commission of war crimes and crimes against humanity.

d. *Acts of Assistance to the Military*

Plaintiffs contend that "Talisman, along with its GNPOC partners" assisted the Sudanese military [**112] by supplying the military with fuel and accommodations and building roads, among other things.[87] In particular, the plaintiffs argue that the construction of all-weather roads was significant assistance. The conflict in the Sudan was shaped by the changing seasons. The Government enjoyed a significant advantage because it had better vehicles and its forces were more mobile.

The decision to build the all-weather roads, however, was made by GNPOC. The plaintiffs have pointed to no evidence that Talisman shaped that decision in any way. The plaintiffs have also pointed to no evidence that Talisman provided any accommodations or fuel to the military. Again, Talisman's limited presence on the ground in the Sudan frustrates any effort by the plaintiffs to show that Talisman substantially aided the Sudanese military by providing logistical support, much less that it specifically directed any assistance [*677] to the Government's violation [**113] of international law.

e. *Remaining Examples of Assistance*

The remaining theories of substantial assistance may be quickly described.[88] Plaintiffs allege that

---

[87] The plaintiffs' brief refers specifically to only these three forms of assistance.

[88] Plaintiffs also claim that material assistance was provided to militia groups "by the oil companies." Plaintiffs only

Talisman assisted the Government by using its community development program as a cover for gathering military intelligence. This allegation is based on accusations by Taylor, who is deceased, and is inadmissible hearsay. Plaintiffs' other evidence comes from Yak and Chief Patai and is only speculation of a possible connection between two events: a visit by a community development team from an oil company and an attack on a village two days later.

Finally, plaintiffs contend that Talisman "ratified" the human rights violations [**114] of the Government by publicly denying knowledge of those violations. Talisman's public comments do not constitute substantial assistance in acts of genocide, displacement or the targeting of civilians, and do not raise a question of fact as to whether the statements themselves were specifically directed to assist the Government in committing those acts.

6. *Causation*

Beyond the failure to show Talisman's substantial assistance in the Government's violation of human rights, there remain issues concerning causation. Talisman argues that only a few of the plaintiffs injuries can be causally linked to the violations of international law in which it is alleged to have participated. Because southern Sudan was a war-torn area, with violence ongoing for decades among many

---

admissible evidence linking Talisman to the militia groups is testimony by Gatduel about a meeting with someone called Alnof about an attack on Nimne. There is no evidence of who Alnof is or for whom he worked.

competing factions, every civilian injury cannot be attributed to attacks directed at civilians. Similarly, not every attack is necessarily an attack by the military or militia aligned with the Government. Thus, to recover in this lawsuit, a plaintiff must show that he or she was displaced or injured in an attack by Government forces and that the attack either targeted civilians or was undertaken to displace civilians. [**115][89]

Because Talisman is entitled to summary judgment on all of the claims that plaintiffs have brought against it, it is unnecessary to resolve this argument. A brief review of the plaintiffs' evidence however, suggests that only three plaintiffs have shown that they were displaced by Government attacks to which GNPOC arguably provided assistance: Yol, Mut and Chief Tut.

With respect to the five plaintiffs who were displaced from Blocks 1, 2, and 4 in the period after Talisman acquired Arakis, only these three report that the displacement occurred because of an aerial attack. As to the remainder, they have not identified any basis to infer that the attacks were by Government forces, or forces aligned with the Government, or that the displacement occurred [**116] because of an attack that targeted civilians.

---

[89] Moreover, the plaintiffs acknowledge that not all Government attacks were even connected to the oil industry. According to the plaintiffs' experts, the Government's aggression in the south was also part of a long-term plan of "islamization" and "jihad."

The plaintiffs have failed to present sufficient evidence to find Talisman (or TGNBV or GNPOC) liable for any displacement from Government attacks on civilians in Block 5A, the block in the oil [*678] concession area under the management of Lundin. Only five of the eight plaintiffs who were displaced from Block 5A were displaced by aerial bombardments.[90] Even those attacks cannot be linked to GNPOC, or through GNPOC to Talisman, though.

There were three airstrips in the GNPOC concession: Heglig in Block 2 and Unity and Rubkona in Block 1. GNPOC managed Heglig and Unity; Rubkona was operated by the Government and Lundin and was also the location of a military base. Rubkona lies at the southeast corner of Block 1, and is the airstrip that is both the [**117] furthest south and east.

During the period of Talisman's investment, none of the plaintiffs was displaced or injured in an aerial attack in Block 2. Yol was displaced by an aerial attack in the north of Block 1, to which Heglig was the closest airstrip and Rubkona the most distant. Chief Tut and Mut were displaced and injured in attacks at or south of the Bahr el Arab river in Block 4. Rubkona is somewhat closer than the Unity airstrip to each of these sites, and the Heglig strip is much further away. The Rubkona airstrip is clearly closer to the site of each attack in Block 5A than

---

[90] As for the remaining three plaintiffs displaced from Block 5A, they have not always identified evidence to show that it was the Government who attacked the settlement, or to show that the attack was aimed at civilians.

either the Heglig or Unity airstrip.

The plaintiffs have no admissible evidence to identify the airstrip from which any Government aircraft flew on a particular mission. To the extent that the plaintiffs rely on the inference that helicopter gunship and bomber attacks in Blocks 1, 2 and 4 originated from either Unity or Heglig airstrips, which were under GNPOC's control, rather than the Rubkona airstrip (which was under the Government's control and next to the Lundin concession area) because Unity and Heglig were closer to the area attacked (or almost as close to the area), then they have the burden to [**118] show that attacks in Block 5A were or were at least likely to have been launched from Unity or Heglig instead of the airstrip that was the closest to Block 5A. They have offered no evidence to support such an inference, and they may not shift their burden in this regard by arguing that Talisman has not shown that the attacks did not originate from Rubkona.[91]

---

[91] The plaintiffs argue that Talisman can be linked to the conduct of Lundin in Block 5A, and therefore to attacks in Block 5A, because of a "joint seismic program" between Lundin and Talisman and because oil from Block 5A was transported in the Pipeline. There is no evidence of a "joint seismic program" nor is there any evidence that oil from Block 5A was transported through the Pipeline. Further, Capeling has testified that no oil from Block 5A, or any other non-GNPOC concession, was ever carried in the Pipeline during the time of Talisman's investment in the Sudan.

The plaintiffs also make the following statement in their Responsive Statement: "Lundin's investment in [B]lock 5[A] made economic sense only because of the pipeline which ran from Talisman's concession to the Port Sudan refinery.

[**119] Finally, the claims brought by the two institutional plaintiffs must also be dismissed. Plaintiff NCDS is not an alien and may not bring suit under the ATS. Plaintiff Presbyterian Church has only [*679] presented evidence of a single attack that may be linked to the Government, the destruction of a church in Leer by a bomber. That attack occurred in Block 5A, and there is no evidence to support an inference that the attack originated from the Heglig or Unity airstrips.[92]

In sum, Talisman is entitled to summary judgment on the claims presented in the 2003 Complaint. The plaintiffs have abandoned their claim that Talisman is directly liable for violating international law. The claim that Talisman conspired with the Government of Sudan fails because the plaintiffs' conspiracy claim [**120] relates to the forcible transfer of a civilian population, and international law does not recognize the crime of conspiracy for that conduct. The remaining claim, that Talisman aided and abetted the Government, fails for several reasons, including the plaintiffs' failure to present

---

Conversely, the pipeline made economic sense only if it could also accommodate oil from Block 5[A]." The identified support for this statement is deposition testimony from a human rights researcher that Lundin had "mentioned to Talisman many times that it wanted to hook up to Talisman's pipeline in Block 1." This is inadmissible hearsay, and does not in any event prove the proposition asserted in the Responsive Statement.

[92] In their Responsive Statement, plaintiffs cite to evidence from the deposition of James Abelee about the Government "tactics" of tearing down churches, but have not included the relevant pages of Abelee's deposition in their evidence.

evidence that would raise a question of fact as to whether Talisman performed any act that assisted the Government in its violations of international law.

II. Motion to Amend Complaint

The plaintiffs have moved to amend their complaint. The 2003 Complaint pleads a single claim that the defendant Talisman violated or aided and abetted its co-defendant the Republic of the Sudan to violate the law of nations. It pleaded that Talisman was sued for its own actions, as a successor to Arakis and as a member of GNPOC. It alleges in the body of the pleading that Talisman and the Government conspired with each other to violate the law of nations.

On the eve of summary judgment practice, the plaintiffs moved to amend their pleading and to file a Third Amended Complaint, the 2006 Complaint. When stripped to its essentials, this amendment seeks to hold Talisman liable for the actions of GNPOC. The 2006 Complaint [**121] identifies alter ego, agency, and joint venture liability as additional theories of liability. The plaintiffs advance these new theories to hold Talisman liable for the acts of first TGNBV, and through TGNBV, for the acts of GNPOC. The 2006 Complaint asserts that Talisman is liable as TGNBV's alter ego under a veil piercing theory of liability, or because TGNBV acted as Talisman's agent.[93] In the event that Talisman may

---

[93] The plaintiffs' brief in opposition to summary judgment described not only TGNBV but also GNPOC as Talisman's agent. The 2006 Complaint asserts an agency theory of liability as to TGNBV alone.

be held liable for TGNBV's acts, the joint venture theory seeks in turn to hold TGNBV liable for activities of GNPOC and the Consortium Partners. In contrast to the 2003 Complaint, which focused on the cooperation between Talisman and the Government, the 2006 Complaint asserts that Talisman also acted with GNPOC and TGNBV either by aiding and abetting GNPOC in ethnic cleansing, or conspiring with GNPOC, the Consortium Partners and TGNBV.

[**122] Through the summary judgment motion practice, it has become clear that the plaintiffs have abandoned any claim that Talisman itself violated the law of nations and, as just explained, they have been unable to identify evidence that Talisman aided or conspired with the Government in the latter's violation of the law of nations. Thus, the plaintiffs now depend on the theories of indirect liability that they advanced for the first time in the 2006 Complaint to [*680] hold Talisman liable for GNPOC's activities.

Talisman has opposed the amendment. The plaintiffs' motion to amend their complaint is governed by *Rule 16, Fed R. Civ. P.*, which requires a showing of good cause.[94] *See In re Wireless*

---

[94] The plaintiffs' motion to amend was brought under *Rule 15(a), Fed. R. Civ. P.*, despite the existence of a scheduling order which required any amended pleading to be served by August 15, 2003. Because of that scheduling order, the motion is evaluated under *Rule 16, Fed. R. Civ. P. See Parker v. Columbia Pictures Indus., 204 F.3d 326, 340 (2d Cir. 2003)* (holding that district court did not abuse its discretion in denying leave to amend after deadline set in scheduling order where moving party failed to establish good cause).

*Tel.Servs. Antitrust Litig., 2004 U.S. Dist. LEXIS 19977, 02 Civ. 2637 (DLC), 2004 WL 2244502, at *5 (S.D.N.Y. Oct. 6, 2004).* To show good cause a movant must demonstrate that it has been diligent. *See Grochowski v. Phoenix Constr., 318 F.3d 80, 86 (2d Cir. 2003).*

[**123] The plaintiffs have not shown good cause. They have not even attempted to show their diligence, nor could they. The motion to amend comes over four and a half years after the filing of the lawsuit, over two and a half years after the deadline for amendment, more than two years after Talisman brought a motion attacking the previous theory of secondary liability (aiding and abetting liability) pleaded in the 2003 Complaint, over a year after the close of fact discovery, and virtually on the eve of the filing of the summary judgment motion. While the plaintiffs defend their filing as simply a clarification of theories of secondary liability that were set forth in the 2003 Complaint, they are absolutely wrong. The proposed amendment dramatically alters the plaintiffs' theories of liability and the focus of the entire case.[95]

[**124] It could even be said that the plaintiffs acted in bad faith in waiting until the eve of summary judgment practice to file the motion to

---

[95] Plaintiffs point out that Judge Schwartz observed in a footnote in his March 19, 2003 Opinion, that Talisman may be held liable for GNPOC's acts under a joint venture theory of liability. *Presbyterian Church, 244 F. Supp. 2d at 352 n.50.* Plaintiffs' thereafter amended their complaint -- on August 18, 2003 -- and did not plead a joint venture theory.

amend.[96] The choice of the filing date left the defendant with sixteen days before it was required to file its motion for summary judgment.[97] Talisman chose to address some of the new theories of secondary liability in its summary judgment motion and reserved its right to address all of them in detail in later motion practice in the event the motion to amend were granted.

The plaintiffs have not made any [**125] showing that the newly advanced theories have merit or that they could withstand a motion for summary judgment.[98] Indeed, it does not appear that the plaintiffs are adequately prepared even at this late stage to assert their new theories of secondary [*681] liability. For example, the 2006 Complaint asserts that the corporate structures of five separate corporations should be disregarded in order to impose liability on Talisman for the actions taken by GNPOC. This demands a careful analysis of choice of

---

[96] The motion to amend was filed on April 12, 2006, making it impossible for it to be briefed and decided before April 28, the date on which summary judgment motions were due.

[97] The trial date of January 8, 2007 was set in September 2005, and as the parties were advised at that time, is firm. As a consequence, the schedule for summary judgment motions was chosen to allow time for decision and thereafter time for the parties' preparation of pre-trial submissions.

[98] The plaintiffs assert that the amendment is not futile because it could withstand a motion to dismiss for failure to state a claim. It is much too late in the day for the application of that standard. With the preparation of the Pretrial Order as the next step in the litigation, the newly advanced theories must be able to survive summary judgment practice.

law and foreign law issues, and the plaintiffs do not articulate a coherent analysis of either in response to Talisman's summary judgment motion. Quite to the contrary, the plaintiffs have not presented any affidavits of foreign law and simply ask the Court to disregard settled choice of law principles and apply domestic law. Similarly, the plaintiffs are unable to point to record evidence to support their arguments that, as a factual matter, Talisman so misused the corporate form that the corporate veil should be pierced.

[**126] In opposition to the motion to amend and in support of summary judgment, Talisman argues that it cannot be held liable for TGNBV's conduct because the plaintiffs have not shown that the corporate form of TGNBV and the three intermediate companies between it and Talisman should be disregarded under the laws of Netherlands and England, the states of incorporation for TGNBV and the intermediate companies. Talisman also argues that TGNBV cannot be held liable for GNPOC's conduct or the conduct of the Consortium Members under the Law of Mauritius, the place of GNPOC's incorporation. For the reasons described below, Talisman is correct. While it would be entirely appropriate to deny the plaintiffs' motion to amend without engaging with the merits of the proposed amendment, because of the significance of this litigation to each of the parties, and the fact that the plaintiffs' claims are otherwise subject to dismissal on summary judgment, the remainder of this Opinion will address at least some of the theories of secondary liability that the plaintiffs introduce in the 2006 Complaint. As this discussion demonstrates, the

plaintiffs' motion to amend should be denied not just because of their [**127] utter failure to show good cause, but also because the amendment appears to be futile.

A. Choice of Law Rule

In order to locate the law which would govern a determination of whether Talisman may be held accountable for the actions of TGNBV and GNPOC, it is necessary to select the choice of law standard which will be applied. The plaintiffs' claims are all brought under a federal jurisdictional statute, the ATS. *Sosa, 542 U.S. at 724.* The plaintiffs argue that federal choice of law rules should be applied because of the unique federal interests that are implicated by the ATS. Talisman argues that the choice of law rules of New York, the forum state, should be applied.

The Second Circuit has "never definitively resolved" the question of choice of law in ATS cases, *Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 105 n.12 (2d Cir. 2000),* but did address the issue in *Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). Filartiga* distinguished the inquiry into subject matter jurisdiction, which is provided by the ATS, from the inquiry into choice of law, which it described as "a much broader one, primarily concerned with fairness" [**128] and thus one that looks "to wholly different considerations." *Id. at 889.* While *Filartiga* did not explain what those wholly different considerations were, the decision cited *Lauritzen v. Larsen, 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1954),* which had articulated choice-of-law principles for a Jones Act case in which an injured Danish

seaman working on a Danish ship filed suit in New York to recover for injuries sustained in Cuba. *Id. at 573*. Recognizing the duty "to respect the subjects and the rights of [*682] all other sovereign powers outside its own territory," *id. at 578* (citation omitted), the Court weighed the factors connected to the shipping transaction and the national interests "served by the assertion of authority," *id. at 582*, such as, the place of the wrongful act, the law of the flag, the domicile of the injured seaman, the citizenship of the shipowner, and place of the contract, *id. at 583-88*, to conclude that Danish law supplied the substantive law and forbade recovery. *Id. at 592*. "The purpose of a conflict-of-laws doctrine is to assure that a case will be treated [**129] in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum." *Id. at 591*.

Since the Second Circuit spoke in *Filartiga*, the Supreme Court has significantly curtailed the application of federal common law, and therefore the use of federal choice of law rules, which "are a species of federal common law." *In re Gaston & Snow, 243 F.3d 599, 606 (2d Cir. 2001)*. Under the current framework, "[t]he ability of the federal courts to create federal common law and displace state created rules is severely limited." *Id.* [99] In order to justify the

---

[99] The plaintiffs point out that in *Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786 (2d Cir. 1980)*, the Second Circuit applied federal choice of law rules in a federal question case, with the observation that the "use of federal common law in specialized areas where jurisdiction is not based on diversity has been sanctioned by the Supreme Court since the day *Erie* was decided." *Id. at 795*. A more recent Second

decision to fashion rules of federal common law the "guiding principle is that a significant conflict between some federal policy or interest and use of state law must first be specifically shown." *Atherton v. FDIC, 519 U.S. 213, 218, 117 S. Ct. 666, 136 L. Ed. 2d 656 (1997)* (citation omitted). A generalized allegation of conflict is insufficient to justify the displacement of state law. *See Woodward Governor Co. v. Curtiss Wright Flight Systems, Inc., 164 F.3d 123, 127 (2d Cir. 1999)* ("[A]n actual, significant conflict between a federal [**130] interest and state law must be specifically shown, and not generally alleged." (citation omitted)).

The plaintiffs have not pointed to any conflict that would justify the displacement of the law of the forum state. Rather, they simply contend that federal choice of law principles should [**131] be applied and then proceed to identify just two factors to guide the selection of substantive law: the place of injury and domicile of the parties. They then propose that both those factors be ignored. Since Sudan is not an adequate forum for this lawsuit, *see Presbyterian Church, 244 F. Supp. 2d. at 335-36*, they assert without further discussion that its substantive law should be disregarded too. Since Talisman does business in the United States through subsidiaries, *see Presbyterian Church, 2004 U.S. Dist. LEXIS 17030, 2004 WL 1920978, at *2*, they assert it is appropriate to ignore Canadian law. As a result of

---

Circuit decision, however, observed that *Corporacion* was decided "without the benefit of...federal decisions which limited our power to create federal common law." *Pescatore v. Pan American World Airways, Inc., 97 F.3d 1, 12 (2d Cir. 1996).*

this truncated analysis, the plaintiffs propose that federal common law provide not just the choice of law rule but also the substantive law for issues such as piercing the corporate veil and agency. Plaintiffs emphasize that there is a significant policy interest "implicit in our federal statutory law in providing a forum for adjudication of claims of violations of the law of nations." *Wiwa, 226 F.3d at 100.* [100]

[*683] Pointing to a federal policy interest in providing a forum, however, is not a substitute for the identification of a conflict requiring displacement of state law. *See Empire Healthchoice Assur., Inc. v. McVeigh, 547 U.S. 677, 126 S. Ct. 2121, 2132, 165 L. Ed. 2d 131 (2006)* ("an area of uniquely federal interest establishes a necessary, not a sufficient, condition for the displacement of state law." (citation omitted)). Because the plaintiffs fail to identify any such conflict, New York's choice of law rules will be applied.[101] *Id. at 2132-33.*

---

[100] This federal interest has been acknowledged in this litigation. *See Presbyterian Church of Sudan v. Talisman Energy, Inc., 2005 U.S. Dist. LEXIS 18399, 2005 WL 2082846, at * 7.*

[101] It is unlikely that any conflict could be identified. Since choice of law rules seek to insure that a case will be resolved under the same rules of conduct whatever the forum, and that rights of foreign sovereigns will be respected, *see Lauritzen, 345 U.S. at 578, 591*, it is difficult to believe that federal choice of law rules would not require the application of the law of the state of incorporation to a determination of whether to ignore the corporate form. Plaintiffs' only argument in support of an actual conflict is a footnote that asserts that if New York choice of law rules would result in Dutch law governing questions of corporate form in this action, then the application of New York

[**133] "[U]nder New York choice of law principles, the law of the state of incorporation determines when the corporate form will be disregarded and liability will be imposed on shareholders." *Fletcher v. Atex, Inc., 68 F.3d 1451, 1456 (2d Cir. 1995)* (citation omitted). The discussion that follows will work from the ground up, addressing first GNPOC, then TGNBV, and finally the intermediate Talisman subsidiaries. The law regarding the creation of a joint venture will be described in connection with Talisman's liability for the conduct of GNPOC. Finally, Talisman's liability on the theory that TGNBV was acting as its agent will be discussed in connection with TGNBV.

B. GNPOC

The plaintiffs seek to hold Talisman liable for GNPOC's conduct or the conduct of the Consortium Partners who formed GNPOC on the theory that Talisman is liable, through TGNBV, as a participant in a joint venture. GNPOC is a corporation. The plaintiffs have not shown either that it is appropriate to pierce the corporate veil or to treat it as a joint venture.

1. *Veil Piercing*

GNPOC is incorporated under the laws of Mauritius. GNPOC's articles of incorporation establish that Consortium [**134] Members,

---

law reveals a significant conflict with a federal policy. This result-driven logic is no substitute for the identification of the federal choice of law rule or of a federal policy that is in conflict with the application of New York's choice of law rules.

including TGNBV, own GNPOC as shareholders. As a general rule, under the law of Mauritius, a plaintiff cannot recover damages from a shareholder for wrongs committed by the company. Mauritian law does allow for the corporate veil to be pierced, however, when it can be proved that a company conducts business with the intent to defraud creditors or as a mere facade. There are no Mauritian court decisions that provide guidance on what it means to operate as a facade. When faced with novel questions of corporate law, Mauritian courts turn to English case law for guidance. English courts find that a corporation is a facade when a subsidiary is established as a mere device for the purpose of evading existing obligations to other parties.

Plaintiffs have not presented evidence that the Consortium Members created GNPOC to shield themselves from existing liabilities or that GNPOC conducted its [*684] business with the intent to defraud creditors. Consequently, GNPOC's corporate form will be observed.

2. ***Joint Venture Liability***

Not only have plaintiffs failed to show that GNPOC's corporate veil should be pierced, they have also failed to show that GNPOC or the activities of the [**135] Consortium Partners would otherwise qualify as a joint venture.[102] The parties dispute

---

[102] The plaintiffs include the Government as one of those joint venturers through its ownership of Sudapet, and thereby seek to hold Talisman liable for the Government's conduct as a joint venturer. In order for the Government to be viewed as one of the joint venturers, Sudapet's corporate form would have to be

which law should be applied to analyze joint venture liability. Plaintiffs would apply New York law, while defendant argues that the law of Mauritius governs. The first step in deciding a potential choice of law issue under New York law is to determine whether there is an actual conflict between the laws of the two jurisdictions involved. *Globalnet, 449 F.3d at 382.* The plaintiffs have failed, however, to present evidence to create an issue of fact that a joint venture exists under the laws of either jurisdiction. As a consequence, there is no need to resolve the choice of law dispute. *See Compagnie Noga D'Importation Et D'exp., S.A. v. Russian Fed'n, 361 F.3d 676, 685 (2d Cir. 2004)* ("In any event, because we conclude that the answer to this question is the same regardless which of the bodies of law advocated by the parties is applied here, we need not cut the Gordian choice-of-law knot presented to us by the parties.").

[**136] Under Mauritian law a joint venture is an arrangement between two or more persons to pool resources in equal shares for a specific purpose and for the benefit of a third party. Two forms of joint

---

disregarded. The plaintiffs have failed to provide evidence of the law of Sudan to show what standard should be applied to pierce the corporate veil, or to point to any evidence that describes the relationship of the Government and Sudapet, much less evidence that supports their contention that Sudapet's corporate form should be disregarded. *See First Nat. City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611, 626-27, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983)* (noting that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such").

ventures are recognized: societe de fait, which is not registered or incorporated, and societe civil, which must be registered with the Mauritian Registar of Companies. In order to prove that a corporation is a *defacto* societe de fait, it is necessary to show that all three elements of a joint venture exist: 1) ownership in equal shares 2) of an entity formed for a specific purpose and 3) operating for the benefit of a third party. A third party seeking to bringing suit against a societe de fait can only do so by bringing suit against all its members.

Under New York law, a joint venture is formed when:

> (a) two or more persons enter into an agreement to carry on a venture for profit; (b) the agreement evinces their intent to be joint venturers; (c) each contributes property, financing, skill, knowledge, or effort; (d) each has some degree of joint control over the venture; and (e) provision is made for the sharing of both profits and losses.

SCS Comm'ns, Inc. v. Herrick Co., Inc., 360 F.3d 329, 341 (2d Cir. 2004). [**137] All of the elements must be present before joint venture liability may be imposed. *Itel Containers Int'l. Corp. v. Atlanttrafik Express Service Ltd., 909 F.2d 698, 701 (2d Cir. 1990).* "A joint venture and a corporation are mutually exclusive ways of doing business." *Id. at 702.* "Though business associates may be treated as partners vis-a-vis [*685] one another even when

they operate through a corporation, the corporate form is to be respected in dealings with third parties." *Id.*

The plaintiffs have not presented evidence that would support the imposition of liability on TGNBV (and ultimately the plaintiffs contend on Talisman) as a joint venturer under Mauritian law. None of the agreements among the Consortium Members provides for participation in equal shares or is designed for the benefit of any third party.

Since GNPOC is organized as a corporation, New York law requires its corporate form to be respected and prevents suit by third parties under a joint venture theory. In arguing that the Consortium Members were joint venturers under New York law, the plaintiffs ignore this law (even though they refer to *Itel, 909 F.2d at 702*, which [**138] states that principle clearly) and rely primarily on the agreements the Consortium Members used to set up their operations in Sudan, specifically the Interim Agreement, Consortium Agreement, JOCSA, COPA, EPSA, Surface Agreement, JOA, and JCOA. None of these agreements, however, evidences an intent to create a joint venture.

The Interim Agreement contains a clause that states that the parties do not intend the Interim Agreement to create or constitute a partnership or joint venture ("No Partnership Clause"). The Consortium Agreement states that the Interim Agreement would "continue in full force and effect" except to the extent it was amended by the Consortium Agreement and other agreements and documents signed on March 1. Nothing in the

Consortium Agreement amends the No Partnership Clause.

The JCOSA established GNPOC as a "private limited company with its members' liability limited by shares." The JOCSA makes clear that the parties intend to establish a private limited liability company and not a joint venture. The EPSA, COPA and the Surface Agreement are agreements between the Government and the Consortium Members and do not contain language that suggests an intention to enter [**139] into a joint venture.

The JOA and JCOA are agreements entered into by the Consortium Members detailing their respective obligations under their agreements with the Government of Sudan.[103] The JOA covers oil exploration, production, and development in Blocks 1, 2 and 4.[104] The JCOA covers the construction and operation of the Pipeline from Blocks 1, 2 and 4 to the Red Sea in northern Sudan. The JOA includes a section entitled "Nature of Relationship of Parties" which states that:

> *The rights, duties, obligations and liabilities* of the Parties under this

---

[103] Under both agreements the duties of the Consortium Members under their agreements with the Government were to be performed by GNPOC as the "Joint Operating Company" and "Operator".

[104] The oil operations to be conducted in Blocks 1, 2 and 4 were governed by the Exploration and Production Sharing Agreement ("EPSA"), that the Consortium Members had entered into with the Government on March 1, 1997.

> Agreement *shall be several and individual, not joint or collective*, it being the express intention of the Parties that their ownership of the respective Participating Interests shall be as tenants in common, and this Agreement shall not be deemed or construed to create a partnership, association or trust, or as authorising [sic] any Party to act as an agent, servant or employee for any other Party for any purpose whatsoever except as explicitly set forth herein.

[*686] (Emphasis supplied.) The JCOA contains a similar section, also entitled "Nature of the Relationship of the Parties" which states:

> *The* [**140] *rights, duties and obligations and liabilities* as between the Parties under this Agreement *shall be several and individual, not joint or collective*, it being the express intention of the Parties that their ownership of the respective Ownership Interests shall be as tenants in common, and this Agreement shall not be deemed or construed to create a partnership, association or trust, or as authorizing any Party to act as an agent, servant or employee for any other Party for any purpose whatsoever except as explicitly set forth herein.

The plaintiffs also point to the deposition testimony of Charles [**141] Selby ("Selby"), an officer and legal counsel to SPC, one of the original

Consortium Members whose interests were eventually acquired by Talisman. At his deposition Selby testified that when the Consortium was being formed the relationship of the Consortium Members was described as one of partners or joint venturers and that, in his view, it was fair to characterize the formation of GNPOC as a joint venture.[105] Selby also testified, however, that during the early stages of the formation of the Consortium, the legal relationship of the parties had yet to be defined.

The fact that Consortium Members may have viewed their relationship [**142] as a joint venture or described it informally as such is insufficient to create an issue of fact on joint venture liability. In order to create a joint venture under New York law the parties must enter into an agreement that evidences the intent to establish a joint venture. The plaintiffs have failed to point to any language in any of the agreements executed by the Consortium Members to support a finding of that intent. Because the plaintiffs have not created an issue of fact on one of the elements necessary to establish a joint venture, the plaintiffs are not entitled to disregard GNPOC's corporate form.

---

[105] Plaintiffs also point to a document from February 27, 1997, that seems to be from Arakis, describing the formation of the Consortium. The document concludes that "the *partners to this Sudan petroleum joint venture project* can now look ahead to a long and prosperous relationship as developers of one of the last great oil frontiers in the world today." (Emphasis supplied.)

C. TGNBV and Goal Olie

The plaintiffs seek to hold Talisman liable for the acts of TGNBV either through piercing its corporate veil or under an agency theory.[106] TGNBV and its parent Goal Olie are incorporated under the laws of The Netherlands.

[**143] **1. *Piercing the Veil***

Under Dutch law, the corporate veil may only be pierced to hold the shareholders of a company liable for claims against the company in limited circumstances which relate to insolvency and are not relevant to this litigation. Dutch law allows a parent company to be held liable for the misconduct of a subsidiary where the parent company has ignored the separate legal status of the subsidiary under the doctrine of equation. Where a plaintiff attempts to hold a parent company liable for the conduct [*687] of an indirect subsidiary, Dutch law requires a plaintiff to pierce the corporate veil of each intermediate company before it may reach the parent company.

The doctrine of equation requires a showing that the corporate form has been abused to avoid a legal obligation.[107] In the only case where the Dutch

---

[106] When this action was filed, TGNBV had net assets of over $ 400 million and net income of over $ 90 million. For whatever reason, the plaintiffs chose not to sue TGNBV.

[107] Dutch law bears a remarkable similarity to the law of New York, which requires a showing both that the corporate form has been disregarded and that a fraud or other wrong was committed through the abuse of the corporate form. *See In re Vebeliunas, 332 F.3d 85, 91-92 (2d Cir. 2003).*

Supreme Court has upheld a judgment of liability through the application of the doctrine of equation to two companies, the sole shareholder of one company set up a second company to avoid a third-party attachment that had been filed against him personally. That court has declined to impose liability where the sole basis for application of the doctrine of equation [**144] is the substantial overlap between a parent and its subsidiary, including the facts that they share the same board and conduct the same business activities, and that the parent controls the subsidiary's activities.

The plaintiffs have presented evidence that shows that Talisman closely monitored TGNBV and Goal Olie, that there was an overlap in the membership of the boards, and that some of the board members of both companies were Talisman officials. Viewing that evidence in the light most favorable to the plaintiffs, plaintiffs have still failed to create an issue of material fact that the doctrine of equation should be applied and that the corporate veil that separates TGNBV and Goal Olie from each other and [**145] ultimately from Talisman should be pierced. The plaintiffs have not shown any abuse of the corporate form.

2. ***Agency Liability***

The plaintiffs also contend in the 2006 Complaint that Talisman can be held vicariously liable for any tort committed by TGNBV because TGNBV acted in the Sudan as Talisman's agent. The plaintiffs' truncated discussion of the legal theory relies exclusively on citation to *Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d. 1229 (N.D. Cal. 2004)*, an

ATS decision which denied summary judgment and permitted the plaintiffs to proceed to trial on an actual agency theory but not an alter ego theory of liability. *Id. at 1246-47*. The plaintiffs seek to apply New York or federal common law principles of agency law, observing that they are identical. [108] Conceding that agency principles can be used to find personal jurisdiction over a parent corporation based on a subsidiary's presence, *see Koehler, 101 F.3d 863, 865 (2d Cir. 1996)*, Talisman argues that a plaintiff must pierce the corporate veil to establish liability of the parent for a subsidiary's acts and cannot substitute an agency theory of liability.

[**146] Plaintiffs have failed to address the choice of law analysis that should guide the selection of the substantive law of agency that applies to Talisman's relationship with TGNBV. This failure is particularly problematic because resolving the choice of law question under New York law would require, at a minimum, evidence of the law of two foreign jurisdictions. "[T]he relevant analytical approach to choice of law in tort actions in New York is [*688] the interest analysis." *GlobalNet, 449 F.3d at 384* (citation omitted). Interest analysis seeks to assess "which of the competing jurisdictions has the greatest

---

[108] Under federal law, an agency relationship "depends on the existence of three elements: (1) the manifestation by the principal that the agent shall act for him; (2) the agent's acceptance of the undertaking; *and* (3) the understanding of the parties that the principal is to be in control of the undertaking." *Cleveland v. Caplaw Enters., 448 F.3d 518, 522 (2d Cir. 2006)* (citation omitted).

interest in seeing its law applied to the matter at issue." *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 407 F.3d 34, 50 (2d Cir. 2005).* Where the choice of law concerns a loss allocation rule that "prohibits, assigns or limits liability after a tort occurs", *id.* (citation omitted), the interest analysis is conducted with reference to the principles set forth in *Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (N.Y. 1972). Schreiber, 407 F.3d at 50.* [**147] New York courts have applied the *Neumeier* principles to questions of vicarious liability. *See Elson v. Defren, 283 A.D.2d 109, 726 N.Y.S.2d 407, 413 (1st Dept. 2001).*[109]

Under *Neumeier*, when the parties have different domiciles and it is not clear that the law of a domicile favors its respective litigant, the law of the place of the tort applies, "unless displacing it will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants." *Schreiber, 407 F.3d at 50* (citation omitted).[110] The relevant

---

[109] Under New York law, an attempt to use agency principles to hold a party liable for the tort of another is properly characterized as a question of vicarious liability. *See Filemyr v. Lombardo, 11 A.D.3d 581, 782 N.Y.S.2d 670, 671 (2d Dept. 1992).*

[110] *Neumeier* set forth three rules to guide a court in choosing between the relevant interests at stake. *Schreiber, 407 F.3d at 50.* "The first applies when the parties share a domicile; the second applies when the parties are domiciled in different states and the law of each state is favorable to its respective litigant; and the third is applicable to all other split-domicile cases." *Id.*

jurisdictions for the *Neumeier* analysis would be the Sudan, which is both the locus of the tort and the domicile [**148] of most of the plaintiffs,[111] and the law of Canada, the domicile of Talisman. Under *Neumeier*, the presumption is that the law of the Sudan would apply.

The plaintiffs have not provided evidence of the law of agency from either the Sudan[112] or Canada. There is no reason to find that application of domestic law would be appropriate. Even if American law were applied it may not be appropriate under American law to impose liability on [**149] the parent of a closely-related subsidiary when the corporate veil cannot be pieced. *See Itel, 909 F.2d at 702* (declining to reach issue of whether liability could be imposed on related corporations through agency theory without piercing the corporate veil). This Court declines to investigate these complex issues of foreign law in the absence of assistance from the parties. *See In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 209 (2d Cir. 2003).* Having chosen to assert an agency theory of the eve of summary judgment practice, and to argue that they can proceed to trial on an agency theory, the plaintiffs had the obligation to support their theory with an adequate choice of

---

[111] Three of the plaintiffs, NCDS, Garbang, and Hoth, reside in the United States and are domiciliaries of Minnesota, Illinois and Nebraska, respectively.

[112] While the Sudan is not an adequate forum for this litigation, *see Presbyterian Church, 244 F. Supp. 2d at 335-36*, that does not mean that Sudanese law should not supply the rule of decision.

law analysis. Having failed to do so, for the reasons already described, their motion to amend to plead this theory is denied.[113]

[*689] [**150] **D. English Subsidiaries**

Even if the plaintiffs had shown that it is appropriate to pierce the corporate veil of TGNBV and Goal Olie, they would still need to pierce the corporate veil of three more English corporations in order to reach Talisman. Talisman (UK), Supertest and Igniteserve were each formed under laws of England. English law recognizes each company in a group of companies as a separate legal entity with separate rights and liabilities. A company will not be held liable for the misconduct of another based solely of ownership. When a plaintiff attempts to hold a parent liable for the acts of a subsidiary separated by one or more intermediate companies, the plaintiff must justify the piercing of the corporate veil of each separate corporation.

English courts will pierce the corporate veil to hold a parent liable when the subsidiary is so totally under the control of the parent that it cannot be said to be carrying out its own business. In order to succeed on this theory there must be evidence of something more than supervision or control by the parent of the subsidiary. An English court will also pierce the corporate veil when a subsidiary is a mere

---

[113] As explained in the first section of this Opinion, the plaintiffs need at a minimum to be able to impose liability on Talisman for GNPOC's actions. Tagging Talisman for TGNBV's conduct gets them only part way on that journey.

sham or a facade. [**151] As previously described, a corporation will only be found to be a facade when it was established as a device to evade existing obligations to other parties.

The plaintiffs have not presented any evidence to show that the English subsidiaries did not have distinct businesses or that they were created to avoid existing debts. The only evidence that has been introduced about the corporate structures establishes that the Boards of Talisman UK and Supertest were identical and included Talisman employees Buckee and Sheppard. Taken in the light most favorable to the plaintiffs, this evidence is insufficient to create a material issue of fact that the corporate veil of any of the English subsidiaries should be disregarded.

In sum, the plaintiffs will not be permitted to amend their complaint to hold Talisman liable on theories of liability not pleaded in the 2003 Complaint. They have not explained why they delayed in presenting this motion to amend, and many of the theories they advance are either clearly futile or inadequately supported. To the extent that the plaintiffs seek to hold Talisman liable for aiding or conspiring with someone other than the Government, that application is also [**152] denied on the ground that the plaintiffs have utterly failed to show good cause for this transformation in the theory of their case.

Conclusion

Talisman's motion for summary judgment is granted. The plaintiff's motion to amend is denied.

Talisman's motion to preclude plaintiffs from seeking certain categories of damages is denied as moot.

Dated: New York, New York

September 12, 2006

DENISE COTE

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
07-0016-cv

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 30th day of November, two thousand and nine.

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A, FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KUEIGWONG RAT, LUKA AYUOL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG, YIEN NYINAR RIEK AND MORIS BOL MAJOK, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

-v.-

TALISMAN ENERGY, INC.,

Defendant-Appellee,

REPUBLIC OF THE SUDAN,

Defendant.

The Presbyterian Church of Sudan, Rev. Matthew Mathiang Deang, Rev. James Koung Ninrew, Nuer Community Development Services in USA, Fatuma Nyawang Garbang, Nyot Tot Rieth, individually and on behalf of the Estate of her husband Joseph Thiet Makuac, Stephen Hoth, Stephen Kuina, Chief Tunguar Kueigwong Rat, Luke Ayuol Yol, Thomas Malual Kap, Puok Bol Mut, Chief Patai Tut, Chief Peter Ring Patai, Chief Gatluak Chiek Jang, Yien Nyinar Riek and Moris Bol Majok, on behalf of themselves and all others similarly situated having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is DENIED.

FOR THE COURT:
Catherine O'Hagan Wolfe
Clerk of Court

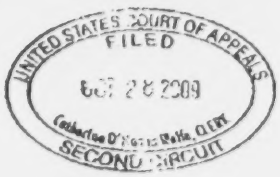
By: /s/ Frank Perez
Frank Perez, Deputy Clerk
[Entry date Nov 30 2009] [EM]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse
at Foley Square, 40 Centre Street
New York, New York 10007
Telephone: 212-857-8500

MOTION INFORMATION STATEMENT



Presbyterian Church of Sudan, et al.,
Petitioner,
-v.-
Talisman Energy, Inc.,
Respondent.

Docket Number(s): 07-0016-cv

Motion for: Leave to file a Brief in Support of Petitioner and Rehearing En Banc

Moving Party: Proposed Amicus Curiae David J. Scheffer

☐ Plaintiff ☐ Defendant
☐ Appellant/petitioner ☐ Appellee/respondent

Moving Attorney: David J. Scheffer
[name of attorney, with firm, address, phone number and e-mail]

David J. Scheffer, Esq.
Center for International Human Rights,
Northwestern University School of Law
357 E. Chicago Avenue
Chicago, IL 60611
(312) 503-2224, d-scheffer@law.northwestern.edu

Opposing Party: Talisman Energy, Inc.

Opposing Attorney: Marc J. Gottridge, Esq.
[name of attorney, with firm, address, phone number and e-mail]
Marc J. Gottridge, Esq.
Lovells
590 Madison Avenue
New York, NY 10022
(212) 909-0660, marc.gottridge@lovells.com

Court-Judge/Agency Appealed From: Amicus supports Petition for Rehearing En Banc to review Second Circuit Panel decision

Please check appropriate boxes:

Has **consent** of opposing counsel:

A. been sought? ☐ Yes ☑ No
B. been obtained? ☐ Yes ☑ No

Is oral **argument** requested? ☐ Yes ☑ No
(requests for oral argument will not necessarily be granted?

Has **argument** date of appeal been set?
☑ Yes ☐ No

If yes, enter date 1/12/2009

For Emergency Motion, Motions for Stays and Injunctions Pending Appeal:
Has request for relief been made below:

☐ Yes ☐ No

Has this relief been previously sought in this Court:

☐ Yes ☐ No

Request return date and explanation of emergency:

Has service been effected: ☑ Yes ☐ No
[Attach proof of service]

Signature of Moving Attorney:

David J. Scheffer **Date:** 10/28/2009

ORDER

Before: Dennis Jacobs, *Chief Judge*

IT IS HEREBY ORDERED that the motion by proposed *amicus curiae* former Ambassador David J. Scheffer for leave to file a brief of 3,500 words in support of Appellants' petition for rehearing *en banc* is DENIED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
by /s/ Joy Fallek,
Joy Fallek, Administrative Attorney

Nov 03 2009
Date

Supreme Court, U.S.
FILED
JUN 21 2010
OFFICE OF THE CLERK

No. 09-1262

IN THE

Supreme Court of the United States

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A., FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the Estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KEIGWONG RAT, LUKA AYOUL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG,

Petitioners,

v.

TALISMAN ENERGY INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF TALISMAN ENERGY INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOSEPH P. CYR *
MARC J. GOTTRIDGE
SCOTT W. REYNOLDS
ANDREW M. BEHRMAN
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
(212) 918-3000
joe.cyr@hoganlovells.com

* Counsel of Record

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

In an action filed against a corporation under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, alleging that the defendant aided and abetted and conspired with a foreign government to commit violations of international law:

1. Whether the Second Circuit correctly held that, under this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the standard for assessing secondary liability under the ATS should be supplied by international law, not domestic law.

2. Whether the Second Circuit correctly held—in conflict with no other federal appellate court—that aiding and abetting liability under international law (and therefore the ATS) may be imposed only if the defendant provided substantial assistance for the specific purpose of facilitating the principal's violation of international law, rather than simply with the knowledge that its actions would assist the principal.

3. Whether this Court should decline to review the petitioners' conspiracy claims, given that they are categorically barred by this Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), as well as petitioners' claims of joint criminal enterprise liability, given that they were never raised in the District Court and, in any event, are unsupported by any decision from this Court or federal court of appeals.

CORPORATE DISCLOSURE STATEMENT OF RESPONDENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court, respondent Talisman Energy Inc. states that it is a nongovernmental corporate party that has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT OF RESPONDENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
COUNTERSTATEMENT OF THE CASE	1
INTRODUCTION	2
REASONS FOR DENYING THE PETITION	5
I. The Second Circuit's Ruling That Aiding and Abetting Under the ATS is Assessed Under International Law Conflicts With No Decision from this Court or Circuit Court	5
A. The Second Circuit's Decision Correctly Applies the Settled Rule from *Sosa*	6
B. There is No Circuit Split on the Governing Law for Complicit Liability Claims Under the ATS	7
II. The Second Circuit's Mens Rea Ruling Presents No Certworthy Question	10
A. Petitioners' Purported Circuit Split on the Correct Standard for Secondary Liability under International Law is Nonexistent	11

TABLE OF CONTENTS—Continued

Page

B. The Second Circuit's Holding Below is Consistent with Customary International Law, Which Requires Intent for Aiding and Abetting Liability 15

1. The Rome Statute of the International Criminal Court 16

2. The ILC Articles of State Responsibility 17

3. ICTY Decisions 17

4. The Nuremberg Decisions 18

C. Only A Standard of Purposeful Facilitation Has Been Universally Accepted, and is Sufficiently Specifically Defined, So As to Permit Federal Courts to Create a Cause of Action for Aiding and Abetting Liability Under the ATS 19

D. Petitioners' Proposed Standard Would Have a Severe Impact on International Trade, And Would Improperly Derogate to Private Parties the Role of Governments and International Organizations 20

III. Even Under Petitioners' Proposed Aiding and Abetting Standard, Their Claims Still Would Fail 23

A. Petitioners Did Not Present Any Admissible Evidence of Talisman Energy's Knowledge 24

TABLE OF CONTENTS—Continued

Page

B. Petitioners Did Not Present Any Admissible Evidence of Talisman Energy's Substantial Assistance..... 24

C. Petitioners Did Not Present Any Admissible Evidence That Talisman Energy Caused Their Alleged Injuries..... 25

IV. The Petition's Remaining Arguments are Either Waived or Squarely Conflict with this Court's Settled Precedents 26

CONCLUSION 29

TABLE OF AUTHORITIES

CASES Page

Abecassis v. Wyatt, No. H-09-3884, 2010 WL 1286871 (S.D. Tex. Mar. 31, 2010).... 14
Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242 (11th Cir. 2005)..... 8
Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005).....*passim*
Corrie v. Caterpillar, Inc., Case No. 05-cv-5192 (W.D. Wash.)..... 22
Doe v. Drummond Co., Case No. 09-cv-01041 (N.D. Ala. Nov. 9, 2009)..... 12, 14
Doe v. Exxon Mobil Corp., Case No. 07-cv-1022 (D.D.C.)..... 22
Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002)..... 8, 13
Flores v. Southern Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003)..... 15, 16
Hamdan v. Rumsfeld, 548 U.S. 557 (2006)..... 4, 26
Jama v. Immigration & Customs Enforcement, 543 U.S. 335 (2005)..... 12
Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254 (2d Cir. 2007)..... 9, 11, 18-19, 20
Lev v. Arab Bank, PLC, No. 08-cv-3251 (NG), 2010 WL 623636 (E.D.N.Y. Jan. 29, 2010)..... 14-15
McDonald's Corp. v. Robertson, 147 F.3d 1301 (11th Cir. 1998)..... 12
The Paquete Habana, 175 U.S. 677 (1900).. 16
Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008)..... 8
Romero v. Drummond Co., Case No. 03-cv-00575 (N.D. Ala.)..... 22

TABLE OF AUTHORITIES—Continued

Page

In re S. African Apartheid Litig., Case No. 02-cv-4712 (S.D.N.Y.) 22
Sarei v. Rio Tinto, PLC, Case No. 00-cv-11695 (C.D. Cal.)..... 22
Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009)..... 8-9
Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).....*passim*
Stickel v. United States, 76 S. Ct. 1067 (1956)..... 13
Swann v. So. Health Partners, Inc., 388 F.3d 834 (11th Cir. 2004)..... 12
Wiwa v. Royal Dutch Petroleum Corp., Case No. 02-cv-7618 (S.D.N.Y.)..... 22
In re XE Services Alien Tort Litig., Case No. 09-cv-615 (E.D. Va.) 22

STATUTES

Alien Tort Statute ("ATS"), 28 U.S.C. § 1350 .....*passim*
First Judiciary Act, 1 Stat. 73 sec. 9..... 4

OTHER AUTHORITIES

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. No. 91 ¶ 462 (Feb. 26)..... 25
Doug Cassel, Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts, 6 Nw. U. J. Int'l Hum. Rts. 304 (2008).....16, 18, 19

TABLE OF AUTHORITIES—Continued

Page

International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts 13, 17
Prosecutor v. Furundzija, Case No. IT-95-17/1-T (Dec. 10, 1998) 16
Prosecutor v. Tadic, Case No. IT-94-1-A, Appeal Judgment (July 15, 1999) 18, 24, 27
Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment (May 7, 1997) 17
Prosecutor v. Vasiljevic, Case No. IT-98-32-A, Appeal Judgment (Feb. 25, 2004)..... 18
Rome Statute of the International Criminal Court 13
S. Ct. Rule 10..... 11
Statute of the International Court of Justice, Art. 38.....13, 15, 16
United States v. Ernst von Weizsäcker, et al. 18

IN THE

Supreme Court of the United States

No. 09-1262

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A., FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the Estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KEIGWONG RAT, LUKA AYOUL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG,

Petitioners,

v.

TALISMAN ENERGY INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF TALISMAN ENERGY INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Talisman Energy respectfully refers the Court to the Statement of the Case set forth in its Conditional Cross-Petition for a Writ of Certiorari, No. 09-1418, filed on May 20, 2010.

INTRODUCTION

In *Sosa v. Alvarez-Machain*, this Court rejected the expansive applications of the Alien Tort Statute ("ATS") that some federal appellate courts had begun to embrace. Realigning the ATS with its text and historical underpinnings, this Court set a "high bar" for claims under the Act. 542 U.S. 692, 720 (2004). And for good reason: that high hurdle would ensure that any claims would be consistent with the First Congress's intent that "the ATS [would] furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." *Id.* at 727.

The Petition in this case attempts to lower *Sosa*'s bar. It does so by advocating a promiscuous theory of secondary liability, one that would stigmatize corporations as "aiders and abetters" of human-rights abuses for nothing more than doing business in countries with imperfect governments. But what the Petition fails to do is identify any square conflict between the Second Circuit's decision below rejecting that expansive view of the ATS and the decisions of any other federal court of appeals.

Nor could it. Since *Sosa*, a number of appellate courts have decided the general question of whether an ATS plaintiff can bring claims for aiding and abetting an international law violation. But despite what the Petition claims, none of those courts—apart from the Second Circuit—has ever analyzed the first two questions raised in the Petition: what source of law provides the standard for adjudicating aiding and abetting claims in ATS cases, and what that standard is.

By contrast, these two issues were at the heart of the Second Circuit's decision below. In looking to

international law for the aiding and abetting standard, and holding that international law requires an intent to facilitate the primary violation, the Second Circuit took seriously this Court's admonition in *Sosa* that claims "'based on the present-day law of nations' should be recognized only if 'accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms' contemporary with enactment of the ATS." Pet. App. A-21 (citing *Sosa*, 542 U.S. at 725). The Second Circuit also took heed of this Court's enumeration of five reasons for courts to exercise "great caution" before recognizing violations of international law that were not recognized in 1789.

Since the Second Circuit rendered its decision, no circuit court has addressed these issues in an ATS case, and only two district courts outside of the Second Circuit have done so. Both those courts (one of which was notably in the Eleventh Circuit, the decisions of which petitioners hold out as creating a circuit split with the Second Circuit) found the Second Circuit's decision "persuasive" and adopted its holdings on both the source and standard for aiding and abetting liability. In light of the impact of the Second Circuit's decision, and the absence of any true conflict with other circuit courts, there is no need for this Court to consider these issues now.

Petitioners' argument that "[c]ontrary to one of the primary original purposes of the ATS, the Second Circuit's decision, if followed, ensures that corporate aiding and abetting cases would be heard in state courts" (Pet. 18) is purely speculative and inappropriately suggests that it would be unwise to allow state courts to hear tort cases arising under international law. As this Court explained in *Sosa*, the ATS was

enacted to provide federal jurisdiction in situations where the Continental Congress previously had unsuccessfully requested that the state legislatures create state court fora to resolve such matters. The ATS therefore gave federal courts concurrent, not exclusive, jurisdiction. 542 U.S. at 718. That is a clear indication that the First Congress was happy for state courts to hear cases that also could be heard by the federal judiciary under the ATS.[1]

Nor should this Court exercise its discretionary jurisdiction to review the petitioners' third question: whether the Second Circuit correctly rejected their claims based on conspiracy and joint criminal enterprise liability. As to conspiracy liability, the Second Circuit faithfully applied this Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). There, this Court held that conspiracy liability under international law is reserved exclusively for charges of genocide and waging aggressive war. Petitioners abandoned any claim for the former and never brought a claim for the latter. Nor is there any true conflict in the lower courts. The Eleventh Circuit cases that petitioners cite to suggest a broader acceptance of conspiracy liability under the ATS all either predate *Hamdan* or fail to discuss it.

Petitioners' joint criminal enterprise argument is likewise unfit for review. For one thing, because petitioners raised this argument for the first time on

---

[1] That Congress knew how to ensure the "uniform application" of law (Pet. 18) in an exclusive federal forum is seen in the very same statute (the First Judiciary Act) that enacted the ATS. That statute provided exclusive jurisdiction to federal courts to hear admiralty cases, in stark contrast to the concurrent jurisdiction granted by the ATS. First Judiciary Act, 1 Stat. 73 sec. 9.

appeal, this case is a poor vehicle for passing upon the question. But in any event, the Second Circuit's decision on the merits was a highly fact-bound resolution that presents no certworthy issue. The panel held that even if such a claim were appropriate in an ATS case, petitioners failed to demonstrate, in opposition to a motion for summary judgment after exhaustive discovery, the requisite intentional conduct. There is, in short, no reason to grant plenary review. The Petition should be denied.

REASONS FOR DENYING THE PETITION

I. THE SECOND CIRCUIT'S RULING THAT AIDING AND ABETTING UNDER THE ATS IS ASSESSED UNDER INTERNATIONAL LAW CONFLICTS WITH NO DECISION FROM THIS COURT OR CIRCUIT COURT.

Petitioners insist that the Second Circuit's ruling—that international law, not federal common law, provides the standard for accessorial liability under the ATS—is "in direct conflict" with a handful of Eleventh Circuit decisions and is even "inconsistent" with *Sosa*. Pet. 13, 15. Not so. The decision below faithfully applies *Sosa* and honors this Court's admonition that federal courts narrowly construe the ATS to reach "a relatively modest set of actions alleging violations of the law of nations." *Id.* at 727. And petitioners' purported circuit split is more imagined than real. That is why the petitioners resort to meaningless string cites instead of actually explaining where the Eleventh Circuit considered—and decided—the question presented in the Petition. The reality is that the Second Circuit remains the only federal appeals court to squarely consider this ques-

tion, let alone articulate a rule of decision. This Court should wait until at least one other federal circuit has adopted the expansive rule that the petitioners press before attempting to resolve the question.

A. The Second Circuit's Decision Correctly Applies the Settled Rule from *Sosa*.

In *Sosa*, this Court held that when Congress enacted the ATS, it intended to vest federal courts with a narrow jurisdictional grant: to hear and adjudicate "the modest number of international law violations with a potential for personal liability at the time" the ATS was enacted in 1789. This Court confirmed that federal courts 200 years later must continue to honor that fundamental intent when applying the Act. Accordingly, this Court articulated a narrow bright-line rule of decision: federal courts may "recogniz[e] a claim under the law of nations as an element of common law" only if that claim shared certain "features of 18th-century paradigms" on which the ATS was premised. 542 U.S. at 724-25. And for such a claim to exist, this Court clarified that it must be based on "a norm" that is "sufficiently definite" under international law. *Id.* at 732. Thus, under *Sosa*, federal courts lack a roving commission to mint new causes of action, but must instead carefully limit their jurisdiction to just the handful of well-defined and established violations of international law.

Naturally, the same rule that governs whether a claim exists under the ATS also governs how liability should be measured for such a claim. Again, this Court's ruling in *Sosa* was crystal clear. The Court emphasized that its decision extended to the "related consideration [of] whether international law extends the scope of liability for a violation of a given norm to

the perpetrator being sued." 542 U.S. at 732 n.20. Thus, under *Sosa*, whether a defendant can be held responsible as an aider and abetter—and what rubric should apply to measure liability—are inquiries that require courts to locate a universally accepted and specifically defined norm in international law. Where no such well-defined norm exists for a particular species of liability, federal courts are powerless to import it into the ATS.

The Second Circuit followed that rule exactly and therefore rejected petitioners' argument that complicit liability is a matter ordinarily left to each particular forum country. It held that "such an expansion would violate *Sosa's* command that we limit liability to 'violations of ... international law ... with ... definite content and acceptance among civilized nations [equivalent to] the historical paradigms familiar when § 1350 was enacted.'" Pet. App. A-30 (citing *Sosa*, 542 U.S. at 732). Instead, the Second Circuit held, "*Sosa* and our precedents send us to international law to find the standard for accessorial liability." *Id.* Because this holding follows *Sosa* to the letter, there is no conflict for this Court to resolve.

B. There is No Circuit Split on the Governing Law for Complicit Liability Claims Under the ATS.

Petitioners concede that the Second Circuit's decision does not conflict with the decisions of any other circuit with respect to the governing law to be applied to complicit liability claims under the ATS except the Eleventh Circuit.[2] But even the one "split" they

[2] In footnote 17 of the Petition, petitioners' state that the Ninth Circuit was divided in its only case to address this issue,

identify proves to be no true split at all. Although petitioners cite a number of Eleventh Circuit cases that they contend "applied civil federal common law tort principles to aiding and abetting liability in ATS cases," (Pet. 13), the cases certainly say no such thing. In fact, the majority of petitioners' cases merely cite back to the same case, *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), and even then they do so only for the proposition that claims for aiding and abetting and conspiracy can sometimes be properly brought under the ATS—precisely the point that the Second Circuit below recognized. *See Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1248 (11th Cir. 2005) (the ATS "reaches conspiracies and accomplice liability") (citing *Cabello*, 402 F.3d at 1157); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) ("the law of this Circuit permits a plaintiff to plead a theory of aiding and abetting liability under the Alien Tort Statute") (citing *Cabello*, 402 F.3d at 1157-58); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1258

---

citing *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002). But petitioners acknowledge that that panel's decision was vacated by the Ninth Circuit by grant of *en banc* review, and the case was settled "before this issue was resolved." Pet. 14 n.17. That decision therefore lacks any precedential value. Even aside from the vacatur of the opinion, the decision fails to help petitioners because the majority of the panel in that case held, consistent with the Second Circuit here, that the ATS required application of international law to the question of aiding and abetting liability. 395 F.3d at 948-49. Judge Reinhardt, in a concurring opinion, believed that federal common law provided the source for such liability, but his analysis, as was true of the majority's analysis, was necessarily given without the benefit of this Court's guidance and instructions in *Sosa*, which was decided nearly two years after the *Unocal* decision.

n.5 (11th Cir. 2009) (same) (citing *Aldana*, 416 F.3d at 1248 and *Romero*, 552 F.3d at 1315).

But the court in *Cabello* did not go further and meaningfully assess—let alone pass upon—the key question decided by the Second Circuit below and challenged here in the Petition: whether secondary liability under the ATS should be measured by domestic or international law. To the contrary, the Eleventh Circuit in *Cabello*, which did not even cite *Sosa*, merely noted that it had not previously "addressed whether claims based on indirect liability are actionable under the [ATS] and the [Torture Victim Protection Act ("TVPA")]." 402 F.3d at 1157. It then held that "by their terms the [ATS] and the TVPA are not limited to claims of direct liability. The courts that have addressed the issue have held that the [ATS] reaches conspiracies and accomplice liability." *Id.*

In none of these cases did the Eleventh Circuit do more than acknowledge that secondary theories of liability are available in ATS cases. That is no different from the Second Circuit's holding either in this case, or in *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007).[3] None of these

---

[3] Petitioners try to manufacture a split within the Second Circuit premised on Judge Hall's concurring opinion in *Khulumani*, in which he opined that federal common law provides the standard for aiding and abetting liability under the ATS. (Pet. 14 n.17). But as the Second Circuit held below, Judge Hall's concurrence was just one opinion within a fractured decision that resulted in a lack of binding precedent on this issue in the Second Circuit. Pet. App. A-28. And the other two judges on the *Khulumani* panel agreed that international law provides the source for complicit liability in ATS cases. *See* 504 F.3d at 268-69 (Katzmann, J., concurring); 504 F.3d at 337 (Korman, J., concurring in part and dissenting in part). The Second Circuit's

Eleventh Circuit cases actually addressed the issue at hand, *i.e.*, when an ATS plaintiff brings a claim for aiding and abetting, what law governs that claim? Accordingly, petitioners' contention that the panel's decision here, a decision which expressly addressed the issue of the governing law, conflicts with the Eleventh Circuit's prior decisions, is wrong.

Because the Second Circuit's decision on the correct source of law for aiding and abetting liability comports with this Court's precedent, and there is no circuit split on this issue, the Petition should be denied.

Talisman Energy also argued below that, contrary to the holdings of the District Court and the Second Circuit, aiding and abetting liability is not sufficiently accepted or specifically defined in international law so as to provide the basis for a claim in ATS cases. If this Court grants certiorari to decide the issue of the correct source of law for aiding and abetting claims in ATS cases, Talisman Energy will substantively brief this issue as well.

II. THE SECOND CIRCUIT'S MENS REA RULING PRESENTS NO CERTWORTHY QUESTION.

Petitioners next contend that even if the Second Circuit was correct to look to international law, as opposed to federal common law, for the aiding and abetting standard in ATS cases, this Court should grant certiorari because the Second Circuit errone-

---

denial of petitioners' request for *en banc* review also suggests that the active judges in the Second Circuit did not believe that the panel's decision here conflicted with its prior decisions or presented any other need for further review.

ously imposed a purposeful facilitation requirement instead of a knowing substantial assistance standard. Petitioners wisely spend little time attempting to gin up a circuit split; none exists. Instead, petitioners largely dispute the Second Circuit's application of this rule of law to the unique facts of this case—for which "[a] petition for a writ of certiorari is rarely granted." S. Ct. Rule 10.

A. Petitioners' Purported Circuit Split on the Correct Standard for Secondary Liability under International Law is Nonexistent.

As with the issue of the correct governing law, petitioners try to manufacture a circuit split on the issue of the standard for aiding and abetting liability from Eleventh Circuit dicta. That is not enough.

The Second Circuit is the only appellate court to have conducted a comprehensive and thorough analysis of customary international law on aiding and abetting liability, as required by this Court in *Sosa*. In determining that the proper standard for such liability is purposeful facilitation the Second Circuit in this case adopted the analysis and reasoning of Judge Katzmann's concurring opinion in *Khulumani*. Both Judge Katzmann and the panel below examined a variety of international law sources and took seriously this Court's admonition in *Sosa* that before a norm of international law can give rise to an ATS claim, it must be both universally accepted and specifically defined.

By contrast, the Eleventh Circuit decisions on which petitioners rely barely allude to that question, let alone meaningfully analyze and resolve it. The

closest that the Eleventh Circuit came to actually discussing the standard for aiding and abetting was in *Cabello*, where the court quoted a jury instruction on aiding and abetting that required the plaintiff to demonstrate that the defendant knowingly provided substantial assistance to the primary wrongdoer. But that instruction was quoted without analysis because the question of the correctness of the instruction was not an issue on appeal.[4] Accordingly, as a district court in the Eleventh Circuit recently held, the Eleventh Circuit's discussion of aiding and abetting liability was mere dicta. *Doe v. Drummond Co.*, 09-cv-01041, slip op. at 16 (N.D. Ala. Nov. 9, 2009). *See also Swann v. So. Health Partners, Inc.*, 388 F.3d 834, 837 (11th Cir. 2004) ("the prior panel rule does not extend to dicta"); *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1315 (11th Cir. 1998) (Carnes, J., concurring) ("dicta in our opinions is not binding on anyone for any purpose").[5] Such dicta has no role to play in this Court's determination of whether to grant certiorari. *See, e.g., Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 351 n.12 (2005) ("Dictum settles nothing, even in the court that

---

[4] Defendant's arguments on appeal in *Cabello* were: (1) that the plaintiff's claims were barred by the statute of limitations; (2) that neither the TVPA nor the ATS provided private causes of action such as the one at issue; (3) that he did not have any command responsibility and did not personally participate in the alleged human rights violations, and, as a result, he was not liable under the TVPA or the ATS; and (4) that the trial court erred with regard to several discovery issues. 402 F.3d at 1151-52.

[5] None of the subsequent Eleventh Circuit cases cited by petitioners and that relied on *Cabello* for the proposition that aiding and abetting claims were cognizable under the ATS even mentioned the correct standard for such claims.

utters it."); *cf. Stickel v. United States*, 76 S. Ct. 1067, 1068 (1956) (Harlan, J.) (denying application for stay and continuance of bail and noting lower court *dictum* "present[s] nothing reviewable by this Court").

Apart from the Second Circuit here, the only other appellate court to address the issue of the correct standard for aiding and abetting liability under international law was the Ninth Circuit in *Unocal*. But as set forth above (*supra*, p. 7 n.2), that decision was vacated and so lacks any precedential value. In addition, because it was issued before this Court's decision in *Sosa*, the Ninth Circuit did not analyze the issue under the strict instructions contained in that decision, *i.e.*, that any norm of international law must be universally accepted and specifically defined before it can support an ATS claim. Without the benefit of those instructions, the Ninth Circuit based its decision solely on several decisions of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. But decisions of those tribunals are, at most, secondary sources of international law. *See* Statute of the International Court of Justice, Art. 38. The Ninth Circuit did not even address other primary sources, such as the Rome Statute of the International Criminal Court, or the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, both of which require intentional facilitation for aiding and abetting liability. If the Ninth Circuit had reviewed those sources, it could not have determined that a knowledge standard is universally accepted in customary international law.

Setting a well-reasoned and comprehensive decision of one circuit that relied on this Court's

precedent, against a vacated decision from another circuit, rendered before this Court's decision, and dicta from a third circuit, does not suffice for certiorari. The Petition should therefore be denied and the issue left to further discussion and consideration by the lower courts. That such percolation could resolve any split, if one even exists, is evidenced by the decisions on aiding and abetting liability under the ATS that courts outside of the Second Circuit have rendered subsequent to the Second Circuit's decision in this case. The court in *Drummond*, after holding *Cabello's* discussion of aiding and abetting liability to be dicta, held that the decisions in both the District Court and the Second Circuit in the present action "are consistent with *Sosa's* command that courts act as 'vigilant door keep[ers]' and exercise restraint in recognizing new causes of action under the ATS." 09-cv-01041, slip op. at 21 (N.D. Ala. Nov. 9, 2009) (citing *Sosa*, 542 U.S. at 729). The court in *Drummond* therefore found the decisions in this action "persuasive and well-reasoned, and adopt[ed] their reasoning." *Id.* The same is true of *Abecassis v. Wyatt*, in which the court found the Second Circuit's holding on the source of law for secondary liability claims "persuasive" and adopted the same standard, *i.e.*, "the ATS will only confer jurisdiction [over secondary liability claims] if there are allegations of purposefulness." No. H-09-3884, 2010 WL 1286871, at * 27 (S.D. Tex. Mar. 31, 2010).[6]

---

[6] Petitioners' citation to a number of earlier district court cases holding that "knowledge is the mental element for aiding and abetting under the ATS" (Pet. 14 n.18) is of little import. Nearly half of the decisions cited are from courts within the Second Circuit. These are therefore implicitly overruled by the Second Circuit's decision below, as recognized by a recent Eastern District of New York decision. *Lev v. Arab Bank, PLC*,

This Court should therefore allow the lower courts to continue to address this issue with the benefit of the Second Circuit's decision before endeavoring to resolve a "conflict" that is likely never to arise.

B. The Second Circuit's Holding Below is Consistent with Customary International Law, Which Requires Intent for Aiding and Abetting Liability.

In determining whether a particular rule is part of customary international law courts must look to concrete evidence of the customs and practices of States. *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 250 (2d Cir. 2003). Article 38 of the International Court of Justice Statute, to which the United States and all United Nations member States are parties, embodies the understanding of States as to what sources constitute competent proof of the content of customary international law. It establishes that the proper primary evidence consists of only those conventions that set forth rules expressly recognized by the contracting States, international custom insofar as it provides evidence of a general practice accepted as law, and the general principles of law recognized by civilized nations. By contrast, judicial decisions only provide secondary evidence of international law. Finally, although Article 38 also recognizes "the teachings of the most highly qualified publicists of the various nations" as another possible

---

No. 08-cv-3251 (NG), 2010 WL 623636, at * 1 (E.D.N.Y. Jan. 29, 2010) (applying the Second Circuit's purposeful facilitation standard to aiding and abetting claims in ATS case). And the other cases, even if district court cases could create a conflict with that of a circuit court, which they cannot, contain insufficient analysis of the issue to support a claim of real conflict with the Second Circuit's decision.

secondary source, this Court has expressly stated that such works "are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U.S. 677, 700 (1900). *See also Flores*, 414 F.3d at 251 n.26 (same).

1. The Rome Statute of the International Criminal Court

Under the Article 38 analysis, the Rome Statute constitutes stronger evidence of customary international law than the decisions of the various international criminal tribunals on which petitioners place so much weight. Unlike those single-purpose tribunals, the Rome Statute reflects the outcome of years of deliberations by States in an effort to reach a consensus regarding its provisions, including the appropriate mens rea standard for aiding and abetting liability. *See, e.g.*, Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 Nw. U. J. Int'l Hum. Rts. 304, 310 (2008) ("There was thus a longstanding disagreement between advocates of a 'knowledge' standard and those who preferred an 'intent' test.") That is exactly what makes the Rome Statute compelling evidence of international law, which is made up of State practice and principles upon which there is substantial, if not universal, agreement. Even the tribunal decisions petitioners cite in their Petition recognize this fact. *See, e.g., Prosecutor v. Furundzija*, Trial Chamber Judgment, ¶ 227 (the Rome Statute may be taken "by and large ... as constituting an authoritative expression of the legal views of a great number of States").

The Second Circuit's reliance on the Rome Statute's standard of purposeful facilitation for aiding and abetting liability is therefore beyond reproach.

2. The ILC Articles of State Responsibility

The same standard is also found in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, which, *inter alia*, set out the general international definition of complicity. Those Articles make clear that aiding and abetting liability only exists if the relevant acts were done with a view to facilitating the commission of a wrongful underlying act.[7]

3. ICTY Decisions

Although some decisions of the ICTY appear to utilize a knowledge standard for aiding and abetting liability, there is also support in the decisions of that tribunal for the intent standard. For instance, in *Prosecutor v. Tadic*, the ICTY Trial Chamber canvassed relevant Nuremberg judgments and found "a clear pattern ...: First there is a requirement of intent, which involves awareness of the act of participation coupled with *a conscious decision to participate*." Case No. IT-94-1-T, Opinion and Judgment, ¶ 674 (May 7, 1997) (emphasis added). Accordingly, the Trial Chamber found the defendant guilty because he had "intentionally assisted directly and substantially in the common purpose of the group." *Id.* at ¶¶ 735, 738. On appeal, the Appeals Chamber confirmed the Trial Chamber's analysis, holding that

---

[7] A detailed explanation of the status of the ILC and the drafting process of its Articles is set forth in the Brief of *Amicus Curiae* Professor James Crawford in Support of Defendant-Appellee, submitted to the Second Circuit in this action.

"[an] aider and abettor carries out acts *specifically directed* to assist ... the perpetration of a certain specific crime." *Tadic* Case No. IT-94-1-A, Appeal Judgment, ¶ 229 (July 15, 1999) (emphasis added). *See also Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Appeal Judgment, ¶ 102(i) (Feb. 25, 2004). The fact that some Tribunal decisions utilize an intent standard, and others, as petitioners argue, a knowledge standard, demonstrates that, as set forth in more detail below (*see* pp. 19-20, below), only the more stringent intent standard has achieved the level of universal acceptance required by this Court in *Sosa*.

4. The Nuremberg Decisions

The Nuremberg decisions on which petitioners rely are also equivocal at best—which is not enough under *Sosa* to constitute a well-defined norm. For instance, in *United States v. Weizsaecker (The Ministries Case)*, the Tribunal declined to impose criminal liability on a bank officer who made a loan with the knowledge, but not the purpose, that the borrower would use the funds to commit a crime. Pet. App. A-31. *See also* Cassel, 6 Nw. U. J. Int'l Hum. Rts. at 314 ("In another case known as the *Ministries Case*, an American military court at Nuremberg rejected a knowledge test."). Similarly, although petitioners and their amici see only a knowledge standard in the *Zyklon B* case in which, they claim, two top officials of the firm that supplied Zyklon B gas for Nazi gas chambers *knowing* it would be used to kill concentration camp prisoners were convicted for their assistance based on the mens rea of knowledge, (Pet. 28, 30 n.34), the principal defendant in that case "not only supplied prussic acid to the S.S. but undertook to train its members how it could be used to kill human beings." *Khulumani*, 504 F.3d at 276 n.11

(Katzmann, J., concurring). From such actions, it is not a great leap to conclude that the defendant had the requisite intent. *See* Cassell, 6 Nw. U. J. Int'l Hum. Rts. at 312 ("[B]y supplying gas in the knowledge that it would be used to kill human beings, one may infer that one of [defendants'] purposes – admittedly secondary – was to encourage continued mass killings of Jews.").

C. Only A Standard of Purposeful Facilitation Has Been Universally Accepted, and is Sufficiently Specifically Defined, So As to Permit Federal Courts to Create a Cause of Action for Aiding and Abetting Liability Under the ATS.

Even if petitioners are correct that some international law sources apply a knowledge standard for aiding and abetting liability, that would not help them here. To create a cause of action in a case brought under the ATS, *Sosa* holds that a federal court must "require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the 18th-century paradigms [this Court has] recognized." *Sosa*, 542 U.S. at 732. *See also id.* at 759 (Breyer, J., concurring) ("to qualify for recognition under the ATS a norm of international law must have a content as definite as, and an acceptance as widespread as, those that characterized 18th-century international norms prohibiting piracy").

The Second Circuit followed this Court's instruction and correctly held that "[e]ven if there is a sufficient international consensus for imposing liability on individuals who *purposefully* aid and abet a violation of international law ... no such consensus

exists for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law." Pet. App. A-30-31 (emphasis in original).

In ATS cases, "[t]he critical question is whether there is a discernible core definition that commands the same level of consensus as the 18th-century crimes identified by the Supreme Court in *Sosa*." *Khulumani*, 504 F.3d at 276 n.12 (Katzmann, J., concurring). At most, a purpose standard for aiding and abetting liability falls within that core; petitioners' knowledge standard certainly does not.

Petitioners' proposed knowledge standard also fails *Sosa's* specificity requirement. Although petitioners cite a number of purported international law sources holding knowledge to be the standard for aiding and abetting liability (Pet. 28-32), nowhere do petitioners, or the sources they cite, set forth the contours of what "knowledge" means. For instance, is it sufficient for a defendant to have constructive knowledge, or is actual knowledge required? In the absence of any specific definition, petitioners' knowledge standard is insufficiently specific to permit a federal court to create a cause of action in ATS cases.

D. Petitioners' Proposed Standard Would Have a Severe Impact on International Trade, And Would Improperly Derogate to Private Parties the Role of Governments and International Organizations.

Central to the "vigilant doorkeeping" this Court required in *Sosa*, is due regard for the "collateral consequences of making international rules privately actionable." 542 U.S. at 727. Petitioners' proposed

aiding and abetting standard would severely and inappropriately impact international trade.

As both lower courts recognized here, the activities that the petitioners identify as assisting the Government of Sudan in committing crimes against humanity and war crimes generally accompany any natural resource development business or the creation of any industry. Pet. App. A-34; B-78. None of the acts was inherently criminal or wrongful. The petitioners' theories of substantial assistance "serve essentially as proxies for their contention that Talisman should not have made any investment in the Sudan, knowing as it did that the Government was engaged in the forced eviction of non-Muslim Africans from lands that held promise for the discovery of oil." Pet. App. B-79.

Petitioners can point to no evidence that Talisman Energy, its indirect subsidiary, or the actual operating company in Sudan in which Talisman Energy's indirect subsidiary owned a 25% share, participated in any attack against a petitioner, or had any illicit intent. No such evidence exists. Instead, petitioners argue that Talisman Energy's general knowledge of the Government of Sudan's record of human rights violations, and its understanding of how the Government would benefit from oil exploration, is a sufficient basis on which to hold Talisman Energy liable. But, as the Second Circuit held, "if ATS liability could be established by knowledge of those abuses coupled only with such commercial activities as resource development, the statute would act as a vehicle for private parties to impose embargos [sic] or international sanctions through civil actions in United States courts. Such measures are not the province of private parties but are, instead, properly

reserved to governments and multinational organizations." Pet. App. A-42.

That the Second Circuit's concern about misuse of the ATS is well-founded is demonstrated by the number of ATS cases brought against multinational corporations operating in developing nations. Such actions, premised on a theory that the defendant corporation aided and abetted the host government's international law violations, have been brought against companies working in Colombia, Papua New Guinea, Nigeria, Indonesia, Iraq, Israel, and South Africa,[8] in addition to this action against Talisman Energy for its alleged activities in Sudan. The "collateral consequences" of imposing secondary liability on corporations in ATS cases under petitioners' lenient standard would include chilling private investment in developing nations for fear that an investor's legitimate business activities will subject it to costly, burdensome and reputation-damaging lawsuits in this country – contrary to the policies of the U.S. government, and other governments around the world, of encouraging investment and commerce in developing nations. The Government of Canada made this exact point in its amicus brief submitted to the Second Circuit below. Brief of Amicus Curiae The Government of Canada in Support of Dismissal of the Underlying Action at 12, *Presbyterian Church*

---

[8] *See Romero v. Drummond Co.*, 03-cv-00575 (N.D. Ala.) (Colombia); *Sarei v. Rio Tinto plc*, 00-cv-11695 (C.D. Cal.) (Papua New Guinea); *Wiwa v. Royal Dutch Petroleum Corp.*, 02-cv-7618 (S.D.N.Y.) (Nigeria); *Doe v. Exxon Mobil Corp.*, 07-cv-1022 (D.D.C.) (Indonesia); *In re XE Services Alien Tort Litig.*, 09-cv-615 (E.D. Va.) (Iraq); *Corrie v. Caterpillar, Inc.*, 05-cv-5192 (W.D. Wash.) (Israel); *In re S. African Apartheid Litig.*, 02-cv-4712 (S.D.N.Y.) (South Africa).

of Sudan v. Talismen Energy Inc., 582 F.3d 244 (2nd Cir. 2009) (07-cv-0016) ("The involvement of the Canadian private sector in the economic development of a developing country such as Sudan is an important element of Canada's overall foreign policy."). *See also* Letter from German Government to Second Circuit in *Balintulo et al. v. Daimler AG et al.*, Case No. 09-2778 (2d Cir. Oct. 8, 2009) ("there is a risk that civil lawsuits in cases of alleged human rights violations could be misused as an instrument against multinational companies, thereby harming international trade").

While these collateral consequences militate against any extraterritorial exercise of jurisdiction in situations where non-U.S. plaintiffs allege wrongful conduct occurring outside the U.S. (*see* Conditional Cross-Petition for a Writ of Certiorari of Talisman Energy Inc., No. 09-1418, filed May 20, 2010), they also demonstrate why petitioners' proposed standard, far from ensuring that the "door to further independent judicial recognition of actionable international norms ... is still ajar subject to vigilant doorkeeping" (*Sosa*, 542 U.S. at 729), would instead blow that door off its hinges.

III. Even Under Petitioners' Proposed Aiding and Abetting Standard, Their Claims Still Would Fail.

Even if this Court grants certiorari and determines that both the District Court and the unanimous panel of the Second Circuit applied the wrong standard for aiding and abetting liability, it would not change the outcome of the case. Under petitioners' proposed standard, they still would have to produce admissible evidence that Talisman Energy (1) knowingly provided (2) substantial assistance and (3) that such

assistance caused petitioners' injuries. Because petitioners did not, and cannot, produce such evidence, their claims would be subject to dismissal on summary judgment even if they are correct on the legal standard. This Court's review would therefore have no impact on the ultimate disposition of this action, and so certiorari is unwarranted.

A. Petitioners Did Not Present Any Admissible Evidence of Talisman Energy's Knowledge.

The knowledge requirement for aiding and abetting liability requires knowledge of the specific international law violations alleged, not merely of the principal's bad acts in general. *See, e.g., Tadic*, Appeals Judgment, ¶ 229 (requiring proof that the defendant carried out acts "specifically directed to assist ... the perpetration of a certain specific crime" with the knowledge that the acts "assist the commission of a specific crime by the principal"). At most petitioners provided evidence that Talisman Energy had general knowledge of the Government of Sudan's wrongful acts in southern Sudan. But neither the District Court nor the Second Circuit held that Talisman Energy knew of the specific international law violations in which petitioners allege they were injured. Without evidence of such specific knowledge, petitioners cannot succeed on their aiding and abetting claims.

B. Petitioners Did Not Present Any Admissible Evidence of Talisman Energy's Substantial Assistance.

Petitioners put forward a number of activities that they allege Talisman Energy carried out that provided substantial assistance to the Government of

Sudan. These included (1) upgrading airstrips; (2) designating specified areas for oil exploration; (3) providing financial assistance to the Government through the payment of royalties; and (4) giving general logistical support to the Sudanese military. Pet. App. A-36.

But as the Second Circuit recognized in affirming Judge Cote's decision on summary judgment after review of the exhaustive record in this case, "[a]s a threshold matter, Talisman [Energy] did not manage oil operations in the Sudan: its indirect subsidiary Greater Nile was a 25% shareholder in GNPOC, the corporation responsible for developing the concessions. The rest of the GNPOC shares were held by entities from China, Malaysia, and the Sudan." *Id.* A-35. Accordingly, it is undisputed that none of the activities on which petitioners base their claims was carried out by Talisman Energy, the sole corporate defendant in this action. It follows, therefore, that petitioners cannot produce any admissible evidence that Talisman Energy provided any assistance, substantial or otherwise, to the Government of Sudan's international law violations.

C. Petitioners Did Not Present Any Admissible Evidence That Talisman Energy Caused Their Alleged Injuries.

Contrary to petitioners' previous argument in this action, aiding and abetting liability requires that petitioners demonstrate a causal link between Talisman Energy's alleged aiding and abetting and their own injuries. *See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, 2007 I.C.J. No. 91, ¶ 462 (Feb. 26) (to recover damages, Bosnia had to demonstrate "a sufficiently direct

and certain causal nexus between [Serbia's] wrongful act ... and the injury suffered by [Bosnia]").

Petitioners failed to produce any such admissible evidence supporting the requisite causal link between Talisman Energy's alleged knowing substantial assistance and their own alleged injuries.

Because petitioners' claims for aiding and abetting would fail even under the aiding and abetting standard for which they advocate in the Petition, certiorari is unwarranted.

IV. THE PETITION'S REMAINING ARGUMENTS ARE EITHER WAIVED OR SQUARELY CONFLICT WITH THIS COURT'S SETTLED PRECEDENTS.

As with aiding and abetting liability, *Sosa* mandates that federal district courts apply international law to an ATS plaintiff's conspiracy claim. As both the District Court and the Second Circuit recognized, this Court, in *Hamdan v. Rumsfeld*, held that "the only 'conspiracy' crimes that have been recognized by international war crimes tribunals ... are conspiracy to commit genocide and common plan to wage aggressive war." 548 U.S. at 610. Petitioners never pleaded the waging of aggressive war, and abandoned any claim of conspiracy to commit genocide.

The Eleventh Circuit cases that petitioners cite as the only evidence of a purported circuit split on the issue of conspiracy liability (Pet. 34) do not cite *Hamdan*, contain no detailed analysis, and simply assume that federal common law supplies the standard. *See, e.g.*, *Cabello*, 402 F.3d at 1159. Such

decisions do not therefore constitute a true conflict with the Second Circuit's detailed analysis.[9]

Petitioners' belated reliance on joint criminal enterprise liability fares no better. In opposing Talisman Energy's motion for summary judgment, petitioners argued that the court should apply federal common law to the allegations of conspiracy. On appeal, in addition to arguing that Judge Cote was wrong in applying international law, petitioners also argued for the first time that Talisman Energy could be liable under the theory of joint criminal enterprise, as that term has been used by the ICTY. In response, the Second Circuit correctly held that regardless of the appropriateness of such a theory of liability in ATS cases, "an essential element of a joint criminal enterprise is 'a criminal intention to participate in a common criminal design.'" Pet. App. A-33 (citing *Tadic*, Appeal Judgment, ¶ 206). And, as with their aiding and abetting claim, petitioners could not demonstrate such intent.

Petitioners can cite to no other appellate decision that even discusses the concept of joint criminal enterprise liability, let alone reaches a definitive deci-

---

[9] As the Second Circuit recognized, even if it had adopted petitioners' preferred definition of conspiracy, petitioners would fare no better "because that definition (derived from domestic law) also requires proof 'that ... [the defendant] joined the conspiracy *knowing of at least one of the goals of the conspiracy and intending to help accomplish it*.'" Pet. App. A-32 (citing *Cabello*, 402 F.3d at 1159 (emphasis added by Second Circuit)). In the absence of any admissible evidence supporting the allegation that Talisman Energy intended to help the Government of Sudan accomplish human rights violations, petitioners' conspiracy claim, even if permissible, must fail.

sion on the issue, and so can point to no circuit split requiring this Court's review.

Petitioners now raise yet another theory of liability—common purpose liability under the Rome Statute—and criticize the Second Circuit for not being omniscient in addressing an issue that petitioners never put before it. Because petitioners never before raised the argument that Talisman Energy could be liable under Article 25(3)(d) of the Rome Statute either before the District Court or on appeal, it is inappropriate for them to do so at this stage.

But even if it had, certiorari would still be unwarranted. No U.S. court has ever addressed the issue of common purpose liability. This Court should therefore follow its customary practice and refuse to consider a question in the first instance without the guidance of the lower federal courts. By allowing this issue to percolate in the lower courts—and by waiting until at least one circuit court adopts petitioners' rule—this Court will be able to reach a sounder decision in the event it wishes to review the question in the future.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

JOSEPH P. CYR *
MARC J. GOTTRIDGE
SCOTT W. REYNOLDS
ANDREW M. BEHRMAN
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
(212) 918-3000
joe.cyr@hoganlovells.com

* Counsel of Record

Counsel for Respondent

144 (8)

No. 09-1262

JUL 21 2009

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A, FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KUEIGWONG RAT, LUKA AYUOL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG, on behalf of themselves and all others similarly situated,
Petitioners,

vs.

TALISMAN ENERGY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

CAREY R. D'AVINO
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000
cdavino@bm.net

(Additional counsel listed on reverse side.)

PAUL L. HOFFMAN
Counsel of Record
Hoffpaul@aol.com
ADRIENNE J. QUARRY
VICTORIA DON
SCHONBRUN DESIMONE SEPLOW HARRIS & HOFFMAN LLP
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731

Attorneys for Petitioners

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (949) 720-1510

(Additional Counsel for Petitioners)

ERWIN CHEMERINSKY
UNIVERSITY OF
CALIFORNIA, IRVINE
401 East Peltason Drive, 1095
Irvine, California 92697
(949) 824-7722

JOHN M. O'CONNOR
STANLEY A. BOWKER
ANDERSON KILL & OLICK, P.C.
1251 Avenue of the Americas
New York, NY 10020
(212) 278-1000

RICHARD HEINMANN
ELIZABETH CABRASER
DANIEL E. SELTZ
STEVEN E. FINEMAN
RACHEL GEMAN
LIEFF, CABRASER, HEIMANN
& BERNSTEIN, LLP
250 Hudson Street,
8th Floor
New York, NY 10013-1413
(212) 355-9500

No. 09-1262

IN THE

Supreme Court of the United States

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A, FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KUEIGWONG RAT, LUKA AYUOL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG, on behalf of themselves and all others similarly situated,
Petitioners,

vs.

TALISMAN ENERGY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

CAREY R. D'AVINO
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000
cdavino@bm.net

PAUL L. HOFFMAN
Counsel of Record
Hoffpaul@aol.com
ADRIENNE J. QUARRY
VICTORIA DON
SCHONBRUN DESIMONE SEPLOW
HARRIS & HOFFMAN LLP
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731

Attorneys for Petitioners

TABLE OF CONTENTS

Page(s)

Introduction 1

I. The Second Circuit's Decision Is Inconsistent with *Sosa* 3

II. The Second Circuit's "Purpose" Standard Conflicts with the Eleventh Circuit's Federal Common Law Standard and with Established International Law 5

A. The Eleventh Circuit's Application of the Federal Common Law Knowledge Standard Is Precedential 6

B. Customary International Law Requires Knowledge, Not "Purpose," for Aiding and Abetting Liability . . 8

III. Plaintiffs' Claims Would Not Fail on Remand Under the Correct Knowledge Standard 11

Conclusion 14

TABLE OF AUTHORITIES

Page(s)

CASES

Abebe-Jira v. Negewo,
72 F.3d 844 (11th Cir. 1996) 6

Aldana v. Del Monte Fresh Produce, Inc.,
416 F.3d 1242 (11th Cir. 2005) 7

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998) 4

Cabello v. Fernandez-Larios,
402 F.3d 1148 (11th Cir. 2005) 6, 7, 13

Doe v. Drummond,
No. 2:09-CV-01041, slip op., (N.D. Ala.
Nov. 9, 2009) 6

Filartiga v. Pena-Irala,
630 F.2d 876 (2d Cir. 1980) 1

Halberstam v. Welch,
705 F.2d 472 (D.C. Cir. 1983) 7

Prosecutor v. Blagoje Simic,
Case No. IT-95-9-A (Nov. 28, 2006) 9-10

Prosecutor v. Galic,
Case No. IT-98-29-T (Dec. 5, 2003) 14

Prosecutor v. Tadic,
Case No. IT-94-1-A (July 15, 1999) 9

Prosecutor v. Vasiljevic,
Case No. IT-98-32-A (Feb. 25, 2004) 9

Romero v. Drummond Co.,
552 F.3d 1303 (11th Cir. 2008) 7

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 7

Sinaltrainal v. Coca-Cola Co.,
578 F.3d 1252 (11th Cir. 2009) 7

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 1, 3, 5

OTHER AUTHORITIES

Brief for David Scheffer as *Amicus Curiae* Supporting Petitioners,
No. 09-1262 (May 19, 2010) 8

Brief for EarthRights International as *Amicus Curiae* Supporting Petitioners,
No. 09-1262 (May 20, 2010) 4

Brief for International Commission of Jurists and the American Association for the International Commission of Jurists as *Amici Curiae* Supporting Petitioners,
No. 09-1262 (May 19, 2010) 2, 10

Brief of International Law Scholars as *Amici Curiae* Supporting Petitioners, No. 09-1262 (Apr. 30, 2010) 8, 9

Brief for the United States as *Amicus Curiae*, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) 4

Brief for the United States as *Amicus Curiae*, *Pfizer, Inc. v. Abdullahi, et al.*, 562 F.3d 163 (2d Cir. 2009) 4

International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 56th Sess., Supp. No. 10, art. 58, UN Doc. A/56/10 (2001) 8

Prosecutor v. Sainovic et al., Case No. IT-05-87-A, Book of Authorities to Prosecution Response to General Ojdanic's Amended Appeal Brief (Jan. 15, 2010) 10

Prosecutor v. Sainovic et al., Case No. IT-05-87-A, Notice of Filing of Public Redacted Version of Prosecution Response to General Ojdanic's Amended Appeal Brief (Feb. 12, 2010) . . 10

Trial of Bruno Tesch and Two Others (The Zyklon B Case), 1 Law Reports of Trials of War Criminals 93 (Brit. Mil. Ct. 1946) 9

INTRODUCTION

This Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-33 (2004), endorsed the reasoning of most of the judges who had interpreted the Alien Tort Statute ("ATS") in the quarter century after the Second Circuit's seminal opinion in *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980). This Court held that the ATS was jurisdictional but that the Founders intended the federal courts to remedy violations of the law of nations without further Congressional action. *Sosa*, 542 U.S. at 724-25. The Eleventh Circuit's reliance on federal common law for determining the standards for aiding and abetting liability in ATS cases faithfully implements this Court's decision in *Sosa*.

The Second Circuit erred in applying international criminal law standards for such liability in ATS cases. Moreover, even if the Second Circuit was right to consult international standards, it employed a "purpose" standard that sharply deviates from well-established international standards. Since Nuremberg, the international community has made it clear that private parties may be punished if they knowingly assist the perpetrators of genocide, war crimes and crimes against humanity. The Second Circuit's erroneous "purpose" standard imposes more stringent rules for civil aiding and abetting liability than international

law provides for criminal liability.[1] This Court should grant review to resolve the conflict between the Second and Eleventh Circuits and if international standards apply, to ensure that federal courts rigorously adhere to established international standards in ATS litigation.

These Plaintiffs do not seek to impose liability on Talisman Energy, Inc. ("Talisman") merely for "doing business" with Sudan. It is not merely "doing business" for a corporation to knowingly provide substantial assistance to further the commission of genocide, crimes against humanity or war crimes for profit.

Knowing that the joint venture's strategy for expanding oil exploration rested upon the commission of widespread atrocities in Sudan, Talisman joined willingly to exploit the concession's vast untapped oil reserves. As a joint venture partner, Talisman knowingly encouraged and contributed to the commission of systematic human rights violations and engaged in a wide-ranging campaign to cover them up. Only by supplanting well-established law was the Second Circuit able to affirm the dismissal of Plaintiffs' claims.

The issues raised in Plaintiffs' Petition have divided the lower federal courts since *Sosa*.

---

[1] *See* Brief for International Commission of Jurists and the American Association for the International Commission of Jurists as *Amici Curiae* Supporting Petitioners at 2-3, No. 09-1262 (May 19, 2010) ("ICJ Br.").

Talisman's suggestion that this Court should wait to see if the Second Circuit's decision will gain further acceptance should be rejected. The Second Circuit was plainly wrong in its interpretation of international law, as Plaintiffs' *amici* demonstrate. A further delay will only postpone the essential clarification of these issues.

Moreover, Talisman's suggestion that the decisions below were "highly fact-bound," is misleading. Br. Opp'n. Cert. 5. The Second Circuit's decision is based entirely on its holding that the mental state for civil aiding and abetting under the ATS is "purpose." If that decision is reversed, the lower courts would have to review the summary judgment record under the proper standard. The evidence of Talisman's knowledge is indisputable. This Court need not consider or attempt to predict how the lower courts would address the issues remaining on remand.

This case is a timely and appropriate vehicle to resolve the issues presented in the Petition.

I. THE SECOND CIRCUIT'S DECISION IS INCONSISTENT WITH *SOSA*.

In *Sosa*, this Court held that federal common law supplies the cause of action in an ATS case. 542 U.S. at 724. *Sosa* concerned the issue of the primary conduct that violated the law of nations for ATS purposes. *Id.* It did not explicitly decide whether the scope or availability of complicity liability for the primary violation was governed by federal common

law or international standards. This issue now divides the Second and Eleventh Circuits.

The federal courts would ordinarily apply well-established federal common law principles in giving effect to a federal statute. *See* Brief for EarthRights International as *Amicus Curiae* Supporting Petitioners at 13, No. 09-1262 (May 20, 2010); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-55 (1998) (relying on federal common law to fashion a rule of vicarious liability for Title VII claims).[2]

Footnote 20 of *Sosa* does not bear on this issue, much less resolve it. Footnote 20 raised the issue of which primary violations of customary international law require state action to be actionable under the ATS—no more, no less. The Second Circuit's reliance on footnote 20 to hold that international law provides the standard for aiding and abetting liability is

---

[2] The U.S. Government has also expressed its disagreement with Talisman's view of the applicability of international law. Brief for the United States as *Amicus Curiae* at 5, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (Nos. 05-2141 and 05-2326) ("Under the ATS, although the substantive norm to be applied is drawn from international law or treaty, any cause of action recognized by a federal court is one devised as a matter of federal common law -- i.e., the law of the United States."); *see also* Brief for the United States as *Amicus Curiae* at 20, *Pfizer, Inc. v. Abdullahi et. al.*, 562 F.3d 163 (2d Cir. 2009) (No. 09-34) (referring to ATS claims as federal common law claims).

wrong. This Court did not address the issue much less reach such a holding.

Talisman advances a reading of the ATS that would render the statute a dead letter, which is precisely the argument this Court rejected in *Sosa*. *Sosa*, 542 U.S. at 714 (rejecting the argument that the ATS was "stillborn"). Neither this Court, nor Congress, has authorized such a draconian result. The *Sosa* Court approved the ATS as a means to provide a remedy for torts committed in violation of the law of nations. *Id.* at 729. Talisman's position is no less than a request for judicial repeal of the ATS, an appeal that is better addressed to Congress.

II. THE SECOND CIRCUIT'S "PURPOSE" STANDARD CONFLICTS WITH THE ELEVENTH CIRCUIT'S FEDERAL COMMON LAW STANDARD AND WITH ESTABLISHED INTERNATIONAL LAW.

Nothing in Talisman's Opposition refutes the existence of a split among the circuit and district courts. Not only does the Second Circuit's holding, that international law provides the standard for aiding and abetting liability, squarely conflict with the Eleventh Circuit's application of federal common law, but the Second and Eleventh Circuits are also split on the elements for aiding and abetting liability.

A. The Eleventh Circuit's Application of the Federal Common Law Knowledge Standard Is Precedential.

Talisman argues that the Eleventh Circuit's application of the federal common law knowledge standard for aiding and abetting liability in *Cabello v. Fernandez-Larios*, 402 F. 3d. 1148 (11th Cir. 2005), and its progeny, do not constitute binding authority because the jury instruction given in *Cabello* on this issue was not challenged on appeal. Br. Opp'n Cert. 12. Talisman relies on *Doe v. Drummond*, No 2:09-CV-01041, slip. op. at 16 (N.D. Ala. Nov. 9, 2009) (appeal pending), for this argument. Actually, the court in *Cabello* necessarily considered evidence under the aiding and abetting standard on appeal, 402 F.3d at 1158-59, to reject the defendant's third ground of appeal. *Id.* at 1151-52.

Cabello and its progeny are binding precedent in the Eleventh Circuit that federal common law supplies the standard for aiding and abetting liability in ATS cases and that the mental element for such liability is knowledge. 402 F. 3d at 1157-60.[3] Distinguishing dicta and holdings turns on whether

---

[3] The application of federal common law in ATS cases was the law in the Eleventh Circuit before *Sosa* and nothing in *Sosa* would have caused the Eleventh Circuit to alter that precedent. *See Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (giving judicial effect to ATS violations by "fashion[ing] domestic common law remedies").

the court's statement was necessary to the decision, not whether an issue was challenged on appeal.[4]

In *Cabello*, the court analyzed secondary liability standards for both aiding and abetting and conspiracy under federal common law. *Cabello*, 402 F. 3d at 1157-60 (relying on *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983)). The Eleventh Circuit found that federal common law governs complicity liability, which covers both aiding and abetting and conspiracy. It did not find that international law was relevant to its analysis or holding. Thus, the court's reliance on federal common law is precedential.

The Eleventh Circuit has continued to apply federal common law to the issue of aiding and abetting liability in ATS cases,[5] which plainly and inescapably conflicts with the Second Circuit's rejection of federal common law in favor of what it erroneously believed was the international law standard. Indeed, even the Second Circuit and the district court recognized that their decisions were in

---

[4] *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66-67 (1996) (distinguishing "mere obiter dicta" from the well-established rationale of earlier decisions and finding that "it is not only the result but also those portions of the opinion necessary to that result by which we are bound").

[5] *See Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1258 (11th Cir. 2009); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242, 1247-48 (11th Cir. 2005).

conflict with the Eleventh Circuit.[6] Only Talisman appears to deny this.

B. Customary International Law Requires Knowledge, Not "Purpose," for Aiding and Abetting Liability.

The customary international law standard for criminal aiding and abetting liability is knowledge. Brief of International Law Scholars as *Amici Curiae* Supporting Petitioners, No. 09-1262 (Apr. 30, 2010) ("Int'l Law Scholars Br."). The International Law Commission's Articles on State Responsibility does not change this standard,[7] nor does the Rome Statute, which as Amicus Ambassador Scheffer has emphasized, does not supersede customary international law with its ambiguous uninterpreted *mens rea* standard.[8]

---

[6] Pet. A-32 n. 11; Pet B-61.

[7] The principles of state responsibility are irrelevant to Talisman's liability in tort since Article 58 reserves "any question of the individual responsibility under international law . . . ." Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 56th Sess., Supp. No 10, art. 58, UN Doc. A/56/10 (2001).

[8] *See* Brief for David Scheffer as *Amicus Curiae* Supporting Petitioners, at 5-15, No. 09-1262 (May 20, 2010) ("However, if anyone claimed we were writing customary international law on aiding and abetting liability in Article 25(c)(3), they would have been laughed out of the room."); Pet. 32-33.

The *mens rea* for aiding and abetting in the post-World War II prosecutions of Nazi war criminals was knowledge, not purpose. *Id.* at 5-12. Talisman argues that the defendants' high level of culpability in the *Zyklon B* case signals that a higher standard of intent was present,[9] but a defendant's actual level of culpability does not alter the applicable legal standard. The knowledge standard has been consistently applied by international tribunals, including the ICTY, which is required to apply customary international law. Talisman has no real answer to the *amicus* briefs before this Court on this issue.

There is no doubt that the customary international law standard governing ICTY cases is knowledge. *Id.* at 12-15. Talisman, selectively quotes portions of the ICTY's decisions in *Prosecutor v. Tadic*, Case No. IT-94-1-A, (July 15, 1999), and *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, (Feb. 25, 2004), to argue that the ICTY has equivocated on this standard. Br. Opp'n Cert. at 17-18.[10] These

---

[9] Br. Opp'n Cert. 18-19; *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, 1 Law Reports of Trials of War Criminals 93 (1947) (Brit. Mil. Ct., Hamburg, Mar. 1-8 1946).

[10] The full text of the *Tadic* decision clearly shows the standard is knowledge. *See Tadic*, Case No. IT-94-1-A, at ¶ 229. Moreover, the ICTY has repeatedly applied this standard. *See, e.g., Prosecutor v. Blagoje Simic*, Case No. IT-95-9-A, ¶ 86 (Nov. 28, 2006) (citing cases) ("The requisite *mens rea* for aiding and abetting is knowledge

decisions apply the knowledge standard and there is no contrary authority, or any ICTY decision applying the Second Circuit's "purpose" standard. Indeed, the *Talisman* decision has given false hope to alleged war criminals in ICTY proceedings and would undermine U.S. efforts to seek justice against a wide range of international law violators.[11]

Thus, under *Sosa*, there is simply no basis for U.S. courts to formulate a new international law "purpose" standard that has never been applied by any international or domestic court.

---

that the acts performed by the aider and abettor assist in the commission of the specific crime of the principal perpetrator."). *See also* ICJ Br., at 8-10.

[11] In response to an ICTY defendant's brief relying on *Talisman*'s interpretation of aiding and abetting liability under international law, the ICTY Prosecutor has submitted a 462-page, 82-document Book of Authorities as well as a comprehensive brief rebutting the defendant's claims for a purpose standard under customary international law. *See Prosecutor v. Sainovic et al.*, Case No. IT-05-87-A, Notice of Filing of Public Redacted Version of Prosecution Response to General Ojdanic's Amended Appeal Brief, ¶ 249-94 (Feb. 12, 2010); *see generally Prosecutor v. Sainovic et al.*, Case No. IT-05-87-A, Book of Authorities to Prosecution Response to General Ojdanic's Amended Appeal Brief (Jan. 15, 2010).

III. PLAINTIFFS' CLAIMS WOULD NOT FAIL ON REMAND UNDER THE CORRECT KNOWLEDGE STANDARD.

Talisman's contention that Plaintiffs claims would fail under the knowledge standard is wrong and irrelevant in this context. The Second Circuit's entire analysis of the evidence below is based on its "purpose" standard.[12] On remand, the lower court would have to reassess the evidence of Talisman's knowledge and substantial assistance based upon the correct legal standard.

Plaintiffs submitted evidence that Talisman management was informed on multiple occasions that the joint venture depended upon the Sudanese military for security and that the military engaged in systematic attacks against the local civilian population to create a buffer zone as part of the *joint venture's* security strategy.[13] Plaintiffs presented

---

[12] "It is therefore not enough for Plaintiffs to establish Talisman's complicity in depopulating areas in or around the Heglig and Unity camps; Plaintiffs must establish that Talisman acted with the purpose to assist the Government's violations of customary international law." Pet. A-57.

[13] Plaintiffs have identified some of this evidence in their petition. Pet. 6-10. *See* J.A. 003132-33 (Talisman Energy Sudan Steering Committee authorizes use of joint venture airstrips to base helicopter gunships despite knowledge of widespread civilian attacks); J.A. 0031322-33 (Talisman authorizes use of airstrips to base helicopter

irrefutable evidence of Talisman's knowledge that the Sudanese military used joint venture air strips to attack civilian villages. In 2000, the Canadian Government sent an official Assessment Team to Sudan to investigate allegations of systematic human rights violations in the joint venture's oil concession.[14] The Canadian Assessment Team's report concluded that Sudanese military aircraft based at joint venture airstrips conducted attacks against civilian villages within the oil concession.[15] Talisman's own internal reports confirmed these findings,[16] yet Talisman actively concealed these findings and orchestrated a campaign to publicly deny them.[17]

---

gunships despite knowledge of widespread civilian attacks). Plaintiffs are limited here by space constraints but could add many more citations.

[14] "An Assessment Mission was agreed on, mandated to: (a) independently investigate human rights violations . . . , and (b) to investigate and report on the alleged link between oil development and human rights violations, particularly in respect of the forced removal of populations around the oil fields and oil related development." J.A. 002219.

[15] J.A. 002282-83.

[16] J.A. 010222-41.

[17] J.A. 010219 (Talisman executive orders internal human rights report to be revised to show no displacement of civilians due to oil exploration); J.A. 012667 (revised report attributes displacement to inter-

The lower court's observation that none of Talisman's actions were "inherently criminal" clearly conflicts with the civil law of aiding and abetting torts. Pet. A-49. Plaintiffs produced ample evidence that Talisman Energy provided substantial assistance to joint venture security forces knowing that those forces engaged in systematic human rights violations on behalf of the joint venture partners.

Plaintiffs also produced sufficient evidence to support their conspiracy claims. The district court did not reject Plaintiffs' conspiracy claims for lack of evidence. Pet. B 56-63. Instead, the court claimed that Plaintiffs had somehow dropped these claims even though Plaintiffs have *always* asserted them. The Second Circuit specifically addressed joint criminal enterprise liability in its opinion. Pet. A 46-48. Plaintiffs did not allege that Talisman committed the *inchoate* crime of conspiracy, but that Talisman is civilly liable as a conspirator for these *torts* in violation of the law of nations. *See Cabello*, 402 F.3d at 1159. If this Court agrees with the Eleventh Circuit, it is clear that Plaintiffs have produced sufficient evidence of federal common law conspiracy to have a jury decide this issue.

Talisman's argument that petitioners have failed to offer admissible evidence of causation is equally without merit. The district court found that it is uncontested "that the Government's military attacks on civilians in undefended villages

---

tribal fighting).

constitutes war crimes." Pet. B-77. All Plaintiffs must prove is that they were injured in the course of indiscriminate military attacks. *See Prosecutor v. Galic*, Case No. IT-98-29-T, ¶ 57 (Dec. 5, 2003). In any event, neither the district court nor the Second Circuit based their decisions on the causation issue. This issue would also have to be considered on remand if the Second Circuit's "purpose" holding is overturned.

CONCLUSION

For all of these reasons, the Petition should be granted.

Dated: July 20, 2010

Respectfully submitted,

Paul L. Hoffman
Counsel of Record
Schonbrun DeSimone Seplow
Harris & Hoffman LLP
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731

Carey R. D'Avino
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103
(800) 424-6690

Counsel for Petitioners

162

(5)

Supreme Court, U.S.
FILED
MAY 20 2010
OFFICE OF THE CLERK

No. 09-1262

In The

Supreme Court of the United States

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KUONG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A., FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KUEIGWONG RAT, LUKA AYUOL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG, on behalf of themselves and all others similarly situated,

Petitioners,

—v.—

TALISMAN ENERGY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR EARTHRIGHTS INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

MARCO B. SIMONS
Counsel of Record
marco@earthrights.org

RICHARD L. HERZ
JONATHAN G. KAUFMAN
EARTHRIGHTS INTERNATIONAL
1612 K STREET NW, SUITE 401
WASHINGTON, DC 20006
(202) 466-5188

Counsel for *Amicus Curiae*

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. This Is an Appropriate Case to Address the Question of Accessory Liability in Alien Tort Statute Cases 5

II. Federal Common Law Governs Accessory Liability in Alien Tort Statute Cases 8

A. Following *Sosa*, federal common law provides the rules of liability in Alien Tort Statute cases 9

B. International law itself supports the application of domestic law 13

C. Courts generally look to federal liability rules to effectuate federal causes of action 17

D. Congress' original understanding of the Alien Tort Statute mandates application of general common-law rules of liability 18

1. Because the law of nations was incorporated into the common law, general common-law rules of liability apply 19

2. The original intent of the ATS suggests application of general common law rules of liability . 20

III. Under Federal Common Law, Aiding and Abetting Liability Requires Knowing, Substantial Assistance 23

IV. Under Federal Common Law, Conspiracy Requires Evidence of Participation in a Plan With Knowledge of its Unlawful Aims, and Foreseeable Injuries 25

CONCLUSION 29

TABLE OF AUTHORITIES

PAGE

Federal Cases

Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) 12

American Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) 6

Beck v. Prupis, 529 U.S. 494 (2000) 25

Boyle v. United Technologies Corp., 487 U.S. 500 (1988) 18

Burlington Industries, Inc., v. Ellerth, 524 U.S. 742 (1998) 17

Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005) 2, 12, 23, 26-27

Doe v. Islamic Salvation Front, 257 F. Supp. 2d 115 (D.D.C. 2003) 12

Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) . . . . . 5, 12-13 & n.7

Doe v. Unocal Corp., No. 00-56603, Order (9th Cir. Apr. 9, 2003) (*en banc*). 13 n.7

Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078 (S.D. Fla. 1997) 13, 26

Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983) 18

Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983) 25, 27-28

Hartford Accident & Indemnity Co. v. Sullivan, 846 F.2d 377 (7th Cir. 1988) 28

Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996) 26

Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) . . . . . 11, 13 & n.8, 16

Khulumani v. Barclay National Bank Ltd., 504 F.3d 254 (2d Cir. 2007) . . . . . *passim*

Pittman v. Grayson, 149 F.3d 111 (2d Cir. 1998) . 22

Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) . *passim*

Project Hope v. M/V Ibn Sina, 250 F.3d 67 (2d Cir. 2001) 17

Sarei v. Rio Tinto PLC, 487 F.3d 1193 (9th Cir. 2007) 5, 12

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) . . . . . *passim*

Tachiona v. United States, 386 F.3d 205 (2d Cir. 2004) 18

In re Terrorist Attacks on September 11, 2001, 392 F. Supp. 2d 539 (S.D.N.Y. 2005) 26

United States ex rel. Durcholz v. FKW, Inc., 189 F.3d 542, 545 n.3 (7th Cir. 1999) 25 n.17

Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 22, 2002) 22

Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) 12

Federal statutes and public laws

Alien Tort Statute, 28 U.S.C. § 1350 . . . . . *passim*

28 U.S.C. § 2109 6

Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174 (2007) 7 n.3

Darfur Peace and Accountability Act of 2006, Pub. L. No. 109-344 (2006) 7 n.3

Comprehensive Peace in Sudan Act of 2004, Pub. L. No. 108-497 (2004) 7 n.3

Sudan Peace Act, Pub. L. No. 107-245 (2002) . . 7 n.3

Act of Mar. 3, 1819, ch. 77, 3 Stat. 510 ..... 25 n.16

Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 24

State cases

Purviance v. Angus, 1 U.S. (1 Dall.) 180 (Pa. 1786) 23

Richardson v. Saltar, 4 N.C. 505 (1817) 23 n.14

State ex rel. Mays v. Ridenhour, 248 Kan. 919 (1991) 28-29

State v. McDonald, 14 N.C. 468 (1832) 23 n.14

International treaties

Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 ..... 15 n.10

Rome Statute of the International Criminal Court, *adopted* July 17, 1998, 2187 U.N.T.S. 3 ..... 15 n.11, 16 n.12, 17-18

U.K. cases

De Francesco v. Barnum, (1890) 45 Ch.D. 430) 24 n.15

BMTA v. Salvadori, [1949] Ch. 556 ..... 24 n.15

Midland Rollmakers Ltd. v. Collins, (1981) The Times, 18 June (Ch.) 24 n.15

Petrie v. Lamont, (1842) 174 Eng. Rep. 424 (Assizes) 20 n.13

Roger de A., Y.B. 22 Edw. 3, fol. 14b, Mich., Lib. Ass. 43 (1348) 20 n.13

Yarborough and Others v. The Governor and Company of the Bank of England, (1812) 104 Eng. Rep. 991 (K.B.) 20 n.13

Congressional resolutions

S. Res. 684, 110th Cong. (2008) (enacted) 7 n.3

H.R. Res. 740, 110th Cong. (2007) (enacted) . . . 7 n.3

S. Res. 631, 109th Cong. (2006) (enacted) 7 n.3

H.R. Res. 333, 109th Cong. (2005) (enacted) . . . 7 n.3

S. Con. Res. 137, 108th Cong. (2004) (enacted) . 7 n.3

H.R. Res. 194, 108th Cong. (2003) (enacted) . . . 7 n.3

S. Res. 109, 106th Cong. (1999) (enacted) 7 n.3

S. Res. 267, 105th Cong. (1998) (enacted) 7 n.3

H.R. Res. 515, 104th Cong. (1996) (enacted) . . . 7 n.3

S. Con. Res. 140, 102nd Cong. (1992) (enacted) 7 n.3

S. Con. Res. 15, 101st Cong. (1989) (enacted) . . 7 n.3

Presidential statements

President's Statement on Sudan Strategy (Oct. 19, 2009) 8 n.5

President's Letter to Congressional Leaders on Blocking Property of and Prohibiting Transactions with the Government of Sudan (Oct. 13, 2006) 8 n.5

President's Statement on the Fighting in the Darfur Region of Sudan (Apr. 7, 2004) 8 n.5

President's Message to the Congress on the Continuation of the National Emergency With Respect to Sudan (Oct. 31, 2001) 8 n.5

President's Message to the Congress on Sudan (May 5, 1998) 8 n.5

President's Message to the Congress on Sudan (Nov. 3, 1997) 8 n.4

Restatements, treatises, briefs, and law review articles

M. Cherif Bassiouni, *An appraisal of the growth and developing trends of international criminal law*, 45 Revue Internationale de Droit Penal 405, 429 (1974) 14-15

Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587 (2002) 19

Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461 (1989) 24-25

Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents in *Sosa v. Alvarez-Machain*, 2003 U.S. Briefs 339, *reprinted in* 28 Hastings Int'l & Comp. L. Rev. 99 (2004) 22

William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221 (1996) 19-20, 21

John G. Fleming, The Law of Torts (8th ed. 1993) 24

Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. Int'l L. & Pol. 1 (1985) 21

Restatement (Second) of Torts § 876 (1977) 23

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE[1]

EarthRights International (ERI) is a human rights organization based in Washington, D.C., which litigates and advocates on behalf of victims of human rights abuses worldwide. ERI has represented plaintiffs in several lawsuits under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, alleging liability for, *inter alia*, aiding and abetting security forces in carrying out torture and extrajudicial killings. *E.g. Doe v. Unocal Corp.*, No. 00-56603 (9th Cir.); *In re Chiquita Brands Int'l, Inc., Alien Tort Statute & Shareholder Derivative Litig.*, No. 08-MD-01916 (S.D. Fla.).

Amicus therefore has an interest in ensuring that the courts apply the correct body of law and substantive standards to questions of accessorial liability under the ATS. *Amicus* addressed issues

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amicus* made such a monetary contribution. All parties have consented to the filing of this brief and such consents have been lodged with the Court. Counsel for Petitioners received timely notice of intent to file this brief; counsel for Respondents received such notice eight days prior to the filing, but has waived the ten day notice requirement of Rule 37.2(a).

regarding the application of federal common law in ATS cases in an *amicus* brief to the panel below, and participated in oral argument at the Second Circuit's invitation.

SUMMARY OF ARGUMENT

The court below, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), addressed at least three important questions about which the Circuits have disagreed. First, it held that international law provides the proper source of law for assessing accessory liability under the ATS. Second, it held that aiding and abetting requires a purpose to assist the underlying violation of international law. Third, it held that the same *mens rea* applies to liability for civil conspiracy. The Eleventh Circuit reached different results with respect to each question: applying federal common law, it assessed plaintiffs' aiding and abetting claims under a "knowledge" *mens rea* standard, and concluded that liability for civil conspiracy could be found where the evidence showed that the defendant joined the conspiracy knowing its unlawful goals and could foresee the torture and murder of the victim. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158-60 (11th Cir. 2005). The Eleventh Circuit is correct on all three counts.

Certiorari should be granted to resolve these

splits. The Second Circuit's methodology is at odds with this Court's approach in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and with the Framers' intent in drafting the ATS. Moreover, the Second Circuit created new complicity liability standards that cannot be reconciled with ordinary federal common-law tort principles, and which would unjustifiably immunize from liability persons who knowingly assist the most heinous abuses, such as genocide and crimes against humanity. It is appropriate for this Court to address these issues now in order to give guidance to other courts considering similar cases.

The panel below erred by failing to recognize that well-developed common-law rules govern the standards for liability for claims brought under the ATS. The plain language of *Sosa* makes clear that the ATS gives jurisdiction to federal courts to recognize causes of action at federal common law for violations of the law of nations. 542 U.S. at 724. Thus, the dividing line between those issues governed by international law and those by domestic law is clear: international law controls the question of whether a plaintiff's rights have been violated, but because the cause of action itself is derived from the common law, not international law, federal common law governs all other issues. In particular, courts look to federal common law in crafting the remedy, including the liability standards for those alleged to

be complicit in the violation.

International law itself compels the same conclusion. By design, it leaves to domestic law the task of defining the remedies available for international law violations rather than purporting to delineate their scope. The liability rules applicable to defendants allegedly complicit in such violations are a matter for the United States to decide in creating the cause of action, not an issue governed by international norms.

Furthermore, the original intent of the First Congress, which enacted the ATS, would have been to apply rules of liability drawn from general common law, which was understood to incorporate the law of nations. In the early years of the United States, courts regularly interpreted the law of nations and applied general common-law principles to attribute liability.

Applying these general common-law principles, the *mens rea* element for aiding and abetting is knowledge that the acts will substantially assist the tort. Purpose is not required; the defendant need not affirmatively wish the tort to occur.

Finally, also under general common-law principles, liability for civil conspiracy may be found where the evidence shows that a defendant

knowingly and willingly participated in a wrongful plan, regardless of whether the defendant acted with the specific purpose to advance the illegal conduct that injured the plaintiff.

ARGUMENT

I. This Is an Appropriate Case to Address the Question of Accessory Liability in Alien Tort Statute Cases.

Six years ago, the *Sosa* Court held that the ATS's jurisdictional grant was "enacted on the understanding that *the common law* would provide a cause of action" for certain international law violations. 542 U.S. at 724 (emphasis added). Both before *Sosa* and after, courts wrestled with the manner in which common-law rules and norms of international law interrelate in ATS cases, although for various reasons several of these cases produced no precedential decisions. *See, e.g.*, *Doe v. Unocal Corp.*, 395 F.3d 932, 947-48 (9th Cir. 2002), *vacated by grant of reh'g en banc*, 395 F.3d 978 (9th Cir. 2003); *id.* at 964-69 (Reinhardt, J., concurring); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202 (9th Cir. 2007), *vacated by grant of reh'g en banc*, 499 F.3d 923 (9th Cir. 2007), *limited remand on other grounds*, 550 F.3d 822 (9th Cir. 2008); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 268-70 (2d Cir. 2007)

(Katzmann, J., concurring); *id.* at 286-87 (Hall, J., concurring). Indeed, although these issues previously arose and were brought before this Court in a petition seeking review of *Khulumani*, the Court was precluded from addressing the question due to lack of a quorum in that case, resulting in an affirmance as if by an equally divided Court pursuant to 28 U.S.C. § 2109. *See Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).[2]

One judge has stated that "*Sosa* at best lends Delphian guidance on the question of whether the federal common law or customary international law represents the proper source from which to derive" rules of accessory liability. *Khulumani*, 504 F.3d at 286 (Hall, J., concurring). Given the conflicts regarding interpretation of *Sosa*, it is appropriate for this Court now to step in to clarify the issue and resolve the circuit split.

Moreover, the issue of what substantive liability standards apply is important, and should be resolved quickly. The Second Circuit's rule would immunize from ATS liability those who knowingly

---

[2] All of the Justices who took no part in the consideration of this petition remain members of the Court, suggesting that the Court would continue to lack a quorum in the *Apartheid* litigation.

assist genocide and crimes against humanity, whenever they are motivated by profit rather than malice, despite the fact that such knowing assistance suffices for liability for ordinary common-law torts.

Finally, the significance of the instant case also militates in favor of resolving the conflict now. Sudan has long been one of the most notorious locations of severe human rights abuses; the human rights and humanitarian situation in Sudan has been the subject of dozens of actions by Congress over the past two decades, including at least four public laws specifically directed toward Sudan.[3] President Clinton declared a national emergency in response to the threats to U.S. foreign policy posed by Sudan, including "its abysmal human rights

---

[3] *See, e.g.*, Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174 (2007); Darfur Peace and Accountability Act of 2006, Pub. L. No. 109-344 (2006); Comprehensive Peace in Sudan Act of 2004, Pub. L. No. 108-497 (2004); Sudan Peace Act, Pub. L. No. 107-245 (2002); *see also, e.g.*, S. Res. 684, 110th Cong. (2008); H.R. Res. 740, 110th Cong. (2007); S. Res. 631, 109th Cong. (2006); H.R. Res. 333, 109th Cong. (2005); S. Con. Res. 137, 108th Cong. (2004); H.R. Res. 194, 108th Cong. (2003); S. Res. 109, 106th Cong. (1999); S. Res. 267, 105th Cong. (1998); H.R. Res. 515, 104th Cong. (1996); S. Con. Res. 140, 102nd Cong. (1992); S. Con. Res. 15, 101st Cong. (1989) (all enacted).

record,"[4] and every recent President has regularly highlighted human rights abuses in Sudan.[5] Accountability for such abuses is a signature human rights issue of our time that deserves attention by this Court.

II. Federal Common Law Governs Accessory Liability in Alien Tort Statute Cases.

The panel below erred by declining to apply uniform federal common-law rules to determine who may be held liable for complicity under the ATS. *See* 582 F.3d at 258-60. Instead, the panel erroneously concluded that *Sosa* requires courts to look to international law rather than federal common law for "accessorial liability" standards. *Id.* at 259. In fact, *Sosa*, international law, the ordinary role of federal common law in giving effect to federal claims,

---

[4] President's Message to the Congress on Sudan (Nov. 3, 1997).

[5] *See, e.g.*, President's Statement on Sudan Strategy (Oct. 19, 2009) (seeking end to "gross human rights abuses"); President's Letter to Congressional Leaders on Blocking Property of and Prohibiting Transactions with the Government of Sudan (Oct. 13, 2006); President's Statement on the Fighting in the Darfur Region of Sudan (Apr. 7, 2004); President's Message to the Congress on the Continuation of the National Emergency With Respect to Sudan (Oct. 31, 2001); President's Message to the Congress on Sudan (May 5, 1998).

and the original understanding of the ATS all suggest that a uniform body of federal common law should be used to decide this question.[6]

A. Following *Sosa*, federal common law provides the rules of liability in Alien Tort Statute cases.

Sosa's holding that federal common law provides the cause of action in ATS cases, 542 U.S. at 724, entails that the scope of ATS complicity liability is defined by the common law. Although ATS claims require that the plaintiff has suffered a violation of a right guaranteed by international law, the ATS provides "jurisdiction over . . . common law causes of action," *id.* at 721, and thus the *remedy* available for the violation of that right is a question of federal common law. *Accord* Pet. at 22-23. The standard applicable to accomplice liability is a question concerning what causes of action are available for a violation of an international law right, not a question of whether a right has been violated. It is therefore determined by federal common law.

Indeed, as noted in Part II.D, *infra*, when Congress passed the ATS it would not have

---

[6] Judge Hall's concurring opinion in *Khulumani*, 504 F.3d at 286–91, sets forth the proper analysis.

recognized any real distinction between international law rules and general principles of law applicable in common-law actions.

The Second Circuit adopted an entirely different approach. It held that international law controls accessorial liability standards because, it concluded, such liability "is no less significant a decision than whether to recognize a whole new tort in the first place." 582 F.3d at 259. *Sosa*, however, did not suggest that the choice of law is determined by the significance of the relevant issue. Nor does the text or purpose of the ATS provide any support for this view.

Sosa's footnote 20, 542 U.S. at 732 n.20, does not support the Second Circuit's view. As Petitioners note, that footnote only addressed the question of state action under international law. Pet. at 20. But because any state action requirement is part of the definition of an international law violation, this inquiry is necessary to determine whether any internationally-guaranteed right has been violated. Certain acts, such as such as crimes against humanity, war crimes or genocide are prohibited regardless of state involvement. *See id.* Other abuses, such as torture, ordinarily only implicate international law when a state is involved in their commission. *See id.* The reason for this distinction

is that not all acts that would be forbidden if committed by a state actor are of sufficiently "universal concern" if committed by a private actor. *See Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995). Footnote 20 is fully consistent with the distinction between the right (defined by international law) and the remedy (provided by domestic law).

Complicity liability standards are completely different. They do not comprise an element of the right which a plaintiff must prove has been violated. Instead they are a matter of the remedy an individual state may provide, an issue that arises only after it is established that the act that injured the plaintiff is of sufficient universal concern to violate international law. Indeed, the panel below explicitly held that conspiracy is *not* a separate, inchoate offense. 582 F.3d at 260. Likewise, the opinions in *Khulumani* rejected the idea that aiding and abetting must be a distinct offense under international law. *See* 504 F.3d at 284 (Hall, J., concurring) (rejecting notion that international law provides the aiding and abetting standard); *id.* at 280, 281 (Katzmann, J., concurring) (aiding and abetting is "a theory of liability for acts committed by a third party," not "an offense in itself"). In short, international law is the source to determine whether there has been a primary violation, but nothing in

Sosa suggests that the question of "who should be held responsible for a particular act," *id.* at 281, is resolved according to international law.

Consistent with this analysis, the Eleventh Circuit has concluded that common-law doctrines determine who may be held responsible in ATS cases. *See Cabello*, 402 F.3d at 1158-59. A similar result was reached by a Ninth Circuit panel before the case was taken *en banc* to address a question of exhaustion of remedies. *See Sarei*, 487 F.3d at 1202 ("Courts applying the [ATS] draw on federal common law, and there are well-settled theories of vicarious liability under federal common law."). Prior to *Sosa*, several other courts suggested that "liability standards applicable to international law violations" should be developed "through the generation of federal common law," an approach that is "consistent with the statute's intent in conferring federal court jurisdiction over such actions in the first place." *Xuncax v. Gramajo*, 886 F. Supp. 162, 182–83 (D. Mass. 1995); *see also Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (holding that courts may "fashion domestic common law remedies to give effect to violations of customary international law"); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 n.12 (D.D.C. 2003) (considering the possibility that "[t]ort principles from federal common law" apply to determine liability in ATS cases); *Unocal*,

395 F.3d at 966 (Reinhardt, J., concurring) (arguing that federal common law applies in ATS cases "in order to fashion a remedy with respect to the direct or indirect involvement of third parties in the commission of the underlying tort")[7]; *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1094 (S.D. Fla. 1997) (finding ATS liability where "under ordinary principles of tort law [the defendant] would be liable for the foreseeable effects of her actions").

B. International law itself supports the application of domestic law.

International law leaves to domestic law "the task of defining the remedies that are available for international law violations." *Kadic*, 70 F.3d at 246.[8]

---

[7] The *Unocal* majority applied international law aiding and abetting standards, but, contrary to the Second Circuit below, found that application of federal common law may be proper in certain circumstances. 395 F.3d at 947 n.20 & 949 n.25. *En banc* review was to focus on "whether Unocal's liability should be resolved according to general federal common law tort principles" or under "an international-law aiding and abetting standard." *Doe v. Unocal Corp.*, No. 00-56603, Order (9th Cir. Apr. 9, 2003) (*en banc*).

[8] *Kadic* equates "creat[ing] private causes of action" with "defining the remedies," 70 F.3d at 246, consistent with the understanding that *Sosa*'s holding that ATS causes of action arise under federal common law necessarily means that the remedy is governed by common law.

Thus, as Petitioners note, international law itself directs the Court to domestic law as the proper source for remedies and thus for accomplice liability standards. Pet. at 21-22. Moreover, "when international law and domestic law speak on the same doctrine, domestic courts should choose the latter." *Khulumani*, 504 F.3d at 287 (Hall, J., concurring).

Because international law does not generally prescribe rules of private civil liability, the Second Circuit was forced to import criminal standards for accessory liability, which are manifestly inappropriate in civil cases. The better approach is to apply established domestic doctrines of civil liability.[9] Indeed, even international criminal law, like customary international law, generally does not prescribe who may be held liable for an offense; it is primarily enforced "subject to the municipal criminal laws of the states who enter the conventions in question." M. Cherif Bassiouni, *An appraisal of the growth and developing trends of international*

---

[9] Of course, if international law and federal law both adopt the same "knowledge" standard, as Petitioners argue, Pet. at 27-33, no choice need be made. But the importation into federal common-law tort cases of a criminal purpose standard that exceeds the federal tort "knowledge" standard is inappropriate.

criminal law, 45 Revue Internationale dc Droit Penal 405, 429 (1974). The exception is the few international criminal tribunals that have been formed, which cover only a handful of international crimes—notably excluding recognized ATS norms such as piracy and state-sponsored torture. These limited international criminal regimes are created by treaties as one means to enforce norms that are already prohibited by customary international law or other treaties.[10] These regimes do not limit the conduct proscribed by, or the remedies available pursuant to, customary international law.[11]

Moreover, they are created with the

---

[10] Genocide, for example was prohibited by both customary international law and the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, which entered into force in 1951, long before any international tribunal had the power to prosecute particular instances of genocide.

[11] For example, article 10 of the Rome Statute states that the definitions of crimes should not be read "as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." Rome Statute of the International Criminal Court ("Rome Statute") art. 10, *adopted* July 17, 1998, 2187 U.N.T.S. 90. Likewise, article 22(3) notes that limitations on the jurisdiction of the Court "shall not affect the characterization of any conduct as criminal under international law independently of this Statute."

expectation that domestic measures will provide parallel means of enforcing the underlying proscriptions of customary international law. *See Kadic*, 70 F.3d at 240 (for conduct considered international offenses, "international law also permits states to establish appropriate civil remedies"). ATS remedies are not created pursuant to international criminal law; rather, under international law, both international criminal regimes and domestic measures such as the ATS are complementary, parallel enforcement mechanisms. For the nearly 50 years from the Nuremburg Tribunals to the establishment of the Yugoslavia Tribunal in 1993, international criminal law was enforced exclusively through domestic jurisdictions, and even today domestic systems still have the primary enforcement role.[12] Thus, the structure of international law supports the application of domestic rules of civil liability.

---

[12] *See, e.g.*, Rome Statute art. 17(1)(a) (providing that a case is inadmissible before the International Criminal Court if it is "being investigated or prosecuted by a State which has jurisdiction over it").

C. Courts generally look to federal liability rules to effectuate federal causes of action.

As Petitioners note, federal courts nearly always apply preexisting, general tort liability rules to give effect to federal causes of action. Pet. at 24-25 (collecting cases); *accord Khulumani*, 504 F.3d at 287 (Hall, J., concurring); *see also Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 754 (1998) (fashioning "a uniform and predictable standard" of vicarious liability in Title VII actions "as a matter of federal law"); *Project Hope v. M/V Ibn Sina*, 250 F.3d 67, 76 (2d Cir. 2001) (applying federal common law of joint and several liability to federal statutory claims).

Concluding that federal law provides uniform rules of decision does not end the inquiry. A court must also consider what sources to consult in developing such rules. The primary source is preexisting federal principles; any gaps in these principles should be filled by traditional common-law rules, informed by international law as appropriate. If all "significant" issues in ATS cases were governed exclusively by international law, 582 F.3d at 259, rather than by established federal law doctrines, this would lead to absurd consequences. For example, international law does not recognize personal immunities for offenses such as genocide, *see* Rome

Statute of the International Criminal Court, art. 27., July 17, 1998, 2187 U.N.T.S. 3. Doctrines such as head-of-state immunity, government contractor immunity, and even the sovereign immunity of the United States itself are all federal common-law doctrines, not derived from international law. *See, e.g.*, *Tachiona v. United States*, 386 F.3d 205, 220 (2d Cir. 2004) (head-of-state immunity); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (government contractor defense); *Gray v. Bell*, 712 F.2d 490, 506 (D.C. Cir. 1983) (sovereign immunity). Were courts to apply international law to these undoubtedly significant issues, all of which bear on a defendant's liability, these common-law doctrines would fall away. To avoid this, courts should incorporate into ATS claims settled common-law principles, including civil aiding and abetting liability.

D. Congress' original understanding of the Alien Tort Statute mandates application of general common-law rules of liability.

When Congress passed the ATS, it would have expected that, as with other areas of federal law, general common-law principles would apply in ATS cases.

1. Because the law of nations was incorporated into the common law, general common-law rules of liability apply.

The Second Circuit's suggestion that international law determines all significant issues in ATS cases misapprehends the original understanding of Congress as to the relationship between the law of nations and the common law. When the ATS was enacted, no clear distinction was drawn between the two bodies of law; the common law was considered to have encompassed the law of nations in its entirety. It is thus mistaken to think that Congress would have looked to international law for rules of tort liability—which, of course, it did not and still does not provide. Instead, Congress treated liability arising under the law of nations as it did any other common-law tort and applied general common-law rules of liability. *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587, 595 (2002) ("'American courts resorted to this general body of preexisting law to provide the rules of decision in particular cases without insisting that the law be attached to any particular sovereign.'"). Thus, it was understood that a tort in violation of the law of nations would be "cognizable at common law just as any other tort would be." William S. Dodge,

The Historical Origins of the Alien Tort Statute: A Response to the "Originalists," 19 Hastings Int'l & Comp. L. Rev. 221, 234 (1996). Accordingly, as Petitioners note, courts often applied the common law in cases involving the law of nations, including to the issue of the attribution of liability. Pet. at 20-21 & n.27.[13]

2. The original intent of the ATS suggests application of general common-law rules of liability.

As *Sosa* recognized, the First Congress enacted the ATS to give federal courts jurisdiction over tort suits under the law of nations brought by aliens out of concern that the United States was failing to provide a uniform forum for redress of a series of crimes against ambassadors and the

---

[13] As early as 1348, English courts held that one aiding a trespasser, without himself doing another wrong, could be held liable as a trespasser. *See Roger de A.*, Y.B. 22 Edw. 3, fol. 14b, Mich., Lib. Ass. 43 (1348) (modern English paraphrase at http://www.bu.edu/phpbin/lawyearbooks/display.php?id=11792). *See also Yarborough v. The Governor and Company of the Bank of England*, (1812) 104 Eng. Rep. 991 (K.B.) (assuming corporation can be liable for aiding trespass); *Petrie v. Lamont*, (1842) 174 Eng. Rep. 424 (Assizes) ("All persons in trespass who aid or counsel, direct, or join, are joint trespassers").

international law of neutrality, and eagerness to prove its credibility as a new nation. 542 U.S. at 715–19; *see also* Dodge, *supra*, at 229–30. In doing so, they were partially motivated by a fear that state courts, which already had jurisdiction over such suits, could not be trusted to give aliens a fair hearing and might come to divergent conclusions about the content of the law of nations. *See* Dodge, *supra*, at 235–36. Thus, the First Congress desired to make federal courts *more accessible* for foreigners' tort claims. *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. Int'l L. & Pol. 1, 21 (1985).

Given these aims, the First Congress would not have limited accessorial liability to principles drawn from an external body of international law that did not generally prescribe rules of tort liability, when state courts were not so limited. Rather, they expected federal courts, like state courts, to apply the familiar body of general common law that, after all, already incorporated relevant aspects of the law of nations.

The incongruousness of applying international law standards of liability is underlined by the fact that many modern ATS cases also plead domestic common-law tort claims for the same conduct

implicated in the ATS claims. *E.g., Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 U.S. Dist. LEXIS 3293, *6-7 (S.D.N.Y. Feb. 22, 2002). Liability for domestic law claims is typically determined by the common-law standard. *E.g., Pittman v. Grayson*, 149 F.3d 111, 123 (2d Cir. 1998) (recognizing knowing substantial assistance standard as New York tort rule for aiding and abetting). The First Congress would not have wanted a foreign diplomat, for example, who is able to benefit from the general aiding and abetting standard if he or she sues for ordinary assault in a New York court, to face a *higher* burden in federal court on a theory of aiding and abetting a breach of diplomatic inviolability. The panel's rule would disadvantage aliens' claims arising under the law of nations vis-à-vis their state law claims—thus frustrating the aims of the First Congress by "treat[ing] torts in violation of the law of nations less favorably than other torts." Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents in *Sosa v. Alvarez-Machain*, 2003 U.S. Briefs 339, at 14, *reprinted in* 28 Hastings Int'l & Comp. L. Rev. 99, 110 (2004).

III. Under Federal Common Law, Aiding and Abetting Liability Requires Knowing, Substantial Assistance.

The ordinary common-law rule is embodied in the Restatement (Second) of Torts § 876(b) (1977), which requires only that one *knowingly* provide substantial assistance to a person committing a tort. *See Cabello*, 402 F.3d at 1158-59 (affirming ATS liability for knowingly providing substantial assistance); *Khulumani*, 504 F.3d at 287-89 (Hall, J., concurring) (ATS liability may be found for "knowingly and substantially assisting a principal tortfeasor," based in part on Restatement § 876(b)).

This knowledge standard has long been recognized. Indeed, some early cases suggest that liability for aiding and abetting torts was appropriate not only in the absence of specific intent, but even in the absence of actual knowledge. *See, e.g, Purviance v. Angus*, 1 U.S. (1 Dall.) 180, 184-85 (Pa. 1786) (shipmaster held liable for aiding the commission of a tort when he had constructive knowledge that the action was trespass).[14]

---

[14] *See also Richardson v. Saltar*, 4 N.C. (Taylor) 505, 507 (1817) (co-defendants liable for aiding trespass despite lack of evidence that they knew principal perpetrator was acting without legal authority); *State v. McDonald*, 14 N.C. (3 Dev.) 468, 471-72 (1832) (defendants guilty of aiding and abetting

Additionally, in English common law, "there is cogent support both in principle and ancient authority for the suggestion that . . . [k]nowingly assisting . . . would suffice" for liability. John G. Fleming, The Law of Torts 257 (8th ed. 1993).[15] And when the First Congress passed a criminal statute outlawing piracy to comply with its obligations under the law of nations, it included criminal penalties for any person "who shall . . . *knowingly aid and assist*, command, counsel or advise any person" to commit piracy. Act of Apr. 30, 1790, ch. 9, §§ 9–10, 1 Stat. 112, 114 (emphasis added). In passing that law, Congress believed that it was merely codifying the law of nations, as it had been incorporated into the general common law. *See Sosa*, 542 U.S. at 719; Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J.

---

wrongful arrest if they had constructive knowledge that warrant was invalid).

[15] *See also BMTA v. Salvadori*, [1949] Ch. 556 (defendant would be liable for inducing breach of contract if he knowingly entered into a contract inconsistent with the contracting party's obligations (citing *De Francesco v. Barnum*, (1890) 45 Ch.D. 430)); *Midland Rollmakers Ltd. v. Collins*, (1981) The Times, 18 June (Ch.) (bankers who "knowingly lent their aid and assistance to a fraudulent conspiracy" can be liable as members of the conspiracy).

Int'l L. 461, 477 & n.75 (1989).[16]

IV. Under Federal Common Law, Conspiracy Requires Evidence of Participation in a Plan With Knowledge of its Unlawful Aims, and Foreseeable Injuries.

Unlike criminal conspiracy, but like aiding and abetting liability, civil conspiracy is not an independent wrong but rather "a means for establishing vicarious liability for the underlying tort." *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983). In *Beck v. Prupis*, 529 U.S. 494 (2000), this Court "turn[ed] to the well-established common law of civil conspiracy" to define the elements of a civil RICO cause of action. *Id.* at 500. Thus, like aiding and abetting, civil conspiracy forms part of the general federal common-law principles of liability,[17] and it makes sense to look to these principles to determine who is civilly liable for conspiring to commit an ATS violation.

---

[16] Indeed, in a revision to the piracy statutes several years later, Congress explicitly criminalized "the crime of piracy, as defined by the law of nations." Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513-14.

[17] For example, in *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 545 n.3 (7th Cir. 1999), the court noted that "general principles of civil conspiracy apply" to claims under the federal False Claims Act.

The Second Circuit's decision below erred in at least two ways with respect to civil conspiracy. First, in borrowing joint criminal enterprise liability from international criminal law, the Second Circuit departed from a long line of cases concluding that civil conspiracy liability applies to ATS claims. *See, e.g.*, *Cabello*, 402 F.3d at 1159–60; *Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996) (noting that the district court had allowed liability for conspiracy); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 565 (S.D.N.Y. 2005); *Eastman Kodak Co.*, 978 F. Supp. at 1091–92.

Second, the Second Circuit erroneously concluded that civil conspiracy could not be proven by evidence of the defendant's knowing participation in a wrongful scheme. The court found that civil conspiracy requires proof that the defendant acted "with the 'purpose' to advance the Government's human rights abuses." 582 F.3d at 260.[18] The court then considered evidence of Talisman's knowing participation in a scheme to commit abuses, but found this to be insufficient proof of the required

---

[18] The Second Circuit noted that joint criminal enterprise "require[s] the same proof of mens rea as . . . aiding and abetting," 582 F.3d at 260, *i.e.*, the "purpose" standard, and further noted that "plaintiffs would fare no better if we adopted . . . [common-law civil] conspiracy" rules, *id.* at 260 n.11.

"purpose." *Id.* at 262. This contravenes well-established rules of civil conspiracy liability.

In order to sustain a claim for conspiracy, the plaintiff must prove that "(1) two or more persons agreed to commit a wrongful act, (2) [the defendant] joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it, and (3) one or more of the violations was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy." *Cabello*, 402 F.3d at 1159. The Eleventh Circuit went on to conclude that the defendant's liability for conspiracy could be established by evidence the defendant had knowledge of the conspiracy's plan and intended to help accomplish it, because a jury could have reasonably concluded that it was "foreseeable" to defendant that plaintiff would be tortured and killed by his co-conspirators, and could have reasonably inferred that defendant had "actual knowledge" that his co-conspirators were going to kill plaintiff. *Id.*

Similarly, in *Halberstam*, the D.C. Circuit found that defendant Hamilton, the "passive but compliant" partner of co-defendant Welch who killed a man in the course of a burglary, could be held liable for the killing as a co-conspirator based on evidence that she "knew" her co-conspirator was

engaged in illegal activities. 705 F.2d at 474, 486-87. The court found Hamilton liable for conspiracy based on three factual inferences: (1) that she "'knew full well the purpose of [Welch's] evening forays and the means' he used to acquire their wealth," *id.* at 486 (citation omitted); (2) that she "'was a willing partner in his criminal activities,'" *id.* (citation omitted), finding her "unquestioning accession of wealth" consistent with an agreement, *id.* at 487; and (3) that various of her acts "were performed knowingly to assist Welch in his illicit trade." *Id.* at 486.

An equivalent analysis was applied by the Sixth Circuit in *Hartford Accident & Indemnity Co. v. Sullivan*, 846 F.2d 377 (7th Cir. 1988). There, the court applied "general principles" of conspiracy law to determine whether there was sufficient evidence that an attorney had joined a continuing conspiracy to commit bank fraud. *Id.* at 383. Although there was evidence that the attorney had agreed in a plan to obtain one fraudulent loan, there was "no evidence" that this agreement extended to other fraudulent loans. *Id.* The court found evidence that the attorney knew of the ongoing fraudulent loans and "knowingly benefited from the continuation" of the scheme; this left "no doubt" that the attorney had joined the ongoing conspiracy, despite the lack of any direct evidence of the attorney's agreement in the overall scheme. *Id.* at 384. *See also State ex rel.*

Mays v. Ridenhour, 248 Kan. 919, 935 (1991) (concluding that knowingly participating "indicated a willful furtherance" of a wrongful scheme).

In none of these cases was specific evidence of "purpose" required. The Second Circuit failed to recognize that under common-law standards, conspiracy liability may be shown by evidence of participation, knowledge of at least one of a group's unlawful objects, and the foreseeability of the plaintiffs' injuries.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to grant *certiorari*.

DATED: May 20, 2010

Respectfully submitted,

MARCO B. SIMONS
Counsel of Record
RICHARD L. HERZ
JONATHAN G. KAUFMAN
EARTHRIGHTS INTERNATIONAL
1612 K STREET NW, SUITE 401
WASHINGTON, DC 20006
(202) 466-5188
Counsel for *amicus curiae* EarthRights International

No. 09-1262

Supreme Court, U.S.
FILED
APR 30 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PRESBYTERIAN CHURCH OF SUDAN, ET AL.,

Petitioners,

v.

TALISMAN ENERGY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW SCHOLARS WILLIAM ACEVES, PHILIP ALSTON, M. CHERIF BASSIOUNI, DOUGLASS CASSEL, ROGER S. CLARK, DAVID M. CRANE, JOHN DUGARD, RICHARD GOLDSTONE, VED NANDA, SHERI ROSENBERG, LEILA NADYA SADAT, PATRICIA VISEUR SELLERS, DINAH SHELTON, BETH STEPHENS, BETH VAN SCHAACK, AND DAVID WEISSBRODT IN SUPPORT OF PETITIONERS

SUSAN H. FARBSTEIN
Counsel of Record
TYLER R. GIANNINI
INTERNATIONAL HUMAN RIGHTS CLINIC
HARVARD LAW SCHOOL
Pound Hall 401
1563 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-9263
sfarbstein@law.harvard.edu
Attorneys for Amici Curiae

April 30, 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. CUSTOMARY INTERNATIONAL LAW REQUIRES ONLY THAT AN AIDER AND ABETTOR ACT WITH THE *MENS REA* OF KNOWLEDGE 5

A. Nuremberg-era jurisprudence clearly establishes a knowledge standard for aiding and abetting liability 5

B. The international criminal tribunals have affirmed and consistently applied a knowledge standard as customary international law 12

II. THE ROME STATUTE DOES NOT ALTER ESTABLISHED CUSTOMARY INTERNATIONAL LAW OR DICTATE A *MENS REA* OF PURPOSE 16

A. The Rome Statute does not supersede or restrict customary international law ... 17

B. The Rome Statute's *mens rea* for aiding and abetting liability remains ambiguous and could reasonably be interpreted by the ICC to reflect a knowledge standard consistent with customary international law 20

TABLE OF CONTENTS – Continued

Page

III. THIS COURT SHOULD GRANT CERTIORARI TO CONFIRM THAT CUSTOMARY INTERNATIONAL LAW CONTAINS A KNOWLEDGE *MENS REA* STANDARD AND TO PROVIDE NECESSARY GUIDANCE TO THE LOWER COURTS.... 23

CONCLUSION..... 26

APPENDIX INDEX

List of *Amici Curiae* .....App. 1

TABLE OF AUTHORITIES

Page

CASES

Abecassis v. Wyatt, No. 09-03884-cv, slip op. at 51 (S.D. Tex. Mar. 31, 2010).....25

Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005).....2

Doe v. Drummond Co., Inc., No. 08-01041-cv (N.D. Ala. Nov. 9, 2009).....20, 21

Doe v. Unocal, 395 F.3d 932 (9th Cir. 2002), *vacated by grant of en banc review*, 395 F.3d 978 (9th Cir. 2003) 2, 13

Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007).....13, 20

Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) 3, 5, 10, 18, 25

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 4, 6, 23

INTERNATIONAL CASES

Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).....15

Prosecutor v. Blagojević, Case No. IT-02-60-A, Judgment (May 9, 2007).....14

Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment (July 29, 2004).....14

Prosecutor v. Brima, Case No. SCSL-04-16-A, Judgment (Feb. 22, 2008).....15

Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment (Nov. 16, 1998).....13

TABLE OF AUTHORITIES – Continued

Page

United States v. Flick, 6 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 1187 (1947) 7

Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment (Aug. 2, 2007) 15

Prosecutor v. Furundžija, Case No. IT-95-17/1/T, Judgment (Dec. 10, 1998) ..... *passim*

Prosecutor v. Katanga, ICC-01/04-01/07, Pre-Trial Chamber I Decision on the Confirmation of Charges (Sept. 30, 2008) 19, 22

LG Hechingen, Kls 23/47, Justiz und NS-Verbrechen, Vol. 1, 471 (Lfd. Nr. 022) (June 28, 1947), *translated in Modes of Participation in Crimes Against Humanity*, 7 J. Int'l Crim. Just. 131 (2009) 6, 7

United States v. Krauch (The I.G. Farben Case), 8 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 1081 (1948) 10

Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment (Sept. 17, 2003) 14

Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment (Feb. 22, 2001) 14

Prosecutor v. Milutinović, Case No. IT-05-87-T, Judgment (Feb. 26, 2009) 14

Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment (Jan. 27, 2000) 15

TABLE OF AUTHORITIES – Continued

Page

Prosecutor v. Ndindabahizi, Case No. ICTR-01-71-A, Judgment (Jan. 16, 2007) 14

Prosecutor v. Ntagerura, Case No. ICTR-99-46-A, Judgment (July 7, 2006).....14

United States v. Ohlendorf (The Einsatzgruppen Case), 4 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 411 (1948) 8

Trial of Franz Schonfeld and Nine Others, 11 Law Reports of Trials of War Criminals 64 (Brit. Mil. Ct., Essen, June 11-26, 1946).....9

Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment (Mar. 2, 2009).....15

Prosecutor v. Simić, Case No. IT-95-9-A, Judgment (Nov. 28, 2006).....14

Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment (May 7, 1997).....12, 13

Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment (July 15, 1999).....14

Trial of Bruno Tesch and Two Others (The Zyklon B Case), 1 Law Reports of Trials of War Criminals 93 (1947) (Brit. Mil. Ct., Hamburg, Mar. 1-8, 1946) 2, 6, 10

OLG Tübingen, ss 54/47, Justiz und NS-Verbrechen, Vol. 1, 494 (Jan. 20, 1948), *translated in Modes of Participation in Crimes Against Humanity*, 7 J. Int'l Crim. Just. 148 (2009).....7

TABLE OF AUTHORITIES – Continued

Page

Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgment (Feb. 25, 2004) 14

United States v. Von Weizsaecker (The Ministries Case), 14 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 308 (1949) ..... *passim*

U.S. STATUTES

Alien Tort Statute, 28 U.S.C. § 1350 ..... 1, 4

OTHER AUTHORITIES

M. Cherif Bassiouni, 2 *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute* (2005) 18

Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 Nw. U. J. Int'l Hum. Rts. 304 (2008) 18, 25

Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offenses*, 12 Crim. L. Forum 291 (Sept. 2001) 22

Paola Gaeta, *Official Capacity and Immunities, in* 1 *The Rome Statute of the International Criminal Court: A Commentary* (Antonio Cassese ed., 2002) 19

TABLE OF AUTHORITIES – Continued

Page

International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 37 I.L.M. 249, 2149 U.N.T.S. 256 25

Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 Hastings L.J. 61 (2008) 16, 18

Maria Kelt and Herman von Hebel, *General Principles of Criminal Law and the Elements of Crimes, in The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Roy Lee ed., 2001) 21

Guénaël Mettraux, *International Crimes and the* ad hoc *Tribunals* (2005) 13

General Ojdanić's Amended Appeal Brief, Case No. IT-05-87-A (Dec. 11, 2009) 15

General Ojdanić's Reply to the Prosecution's Response to His Second Motion to Amend His Notice of Appeal, Case No. IT-05-87-A (Oct. 15, 2009) 16

Donald K. Piragoff and Darryl Robinson, *Article 30: Mental Element, in Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Otto Triffterer ed., 2008) 20

Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 3

art. 6 20

art. 10 18

art. 22(3) 19

TABLE OF AUTHORITIES – Continued

Page

art. 25 22

art. 25(3)(c) 18, 19, 20, 21

art. 25(3)(d)(ii) 21

art. 27 18

art. 30 21

art. 30(2)(b) 22

Restatement (Third) of Foreign Relations (1987),
§ 102(2) 7

§ 102 cmt. (b) 7

§ 103(2)(a) 12

John Ruggie, Remarks Prepared for International Commission of Jurists Access to Justice Workshop, Johannesburg, South Africa (Oct. 29, 2009) 24

Leila Nadya Sadat, *Custom, Codification and Some Thoughts about the Relationship Between the Two: Article 10 of the ICC Statute*, 49 DePaul L. Rev. 909 (2000) 19

Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (2002) 17

Brief of David J. Scheffer as *Amicus Curiae* in Support of Petitioner and Rehearing en banc, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 07-0016-cv (2d Cir. Oct. 28, 2009) 17, 18

Gerhard Werle, *Principles of International Criminal Law* (2005) 22

INTEREST OF THE *AMICI CURIAE*

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Petitioners.[1] *Amici* (listed in Appendix A) are professors of international law and human rights law, and international jurists who have served as judges and experts on international bodies. Their work has been cited by federal courts for guidance in determining the content of international law in domestic proceedings, including under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350.

Amici submit this brief to advise the Court that under customary international law, the *mens rea* standard for aiding and abetting liability is, and always has been, *knowledge*.[2] This Court should grant certiorari to correct the decision of the court below, which rests on a fundamental misinterpretation of the standard for aiding and abetting liability under

---

[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *amici*'s intention to file this brief. The parties have consented to the filing of this brief, and such consents have been lodged with the Court.

No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

[2] *Amici* take no position on whether federal common law or customary international law provides the standard for aiding and abetting liability in ATS cases, but note that this question alone is worthy of certiorari. *Amici* assume *arguendo* that international law applies and describe the international law standard.

customary international law. In adopting a *mens rea* of purpose, the Second Circuit disregarded and departed from sixty years of jurisprudence and applied a standard in direct conflict with other circuit decisions, *see, e.g.*, *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158-59 (11th Cir. 2005); *Doe v. Unocal*, 395 F.3d 932, 950-51 (9th Cir. 2002), *vacated by grant of en banc review*, 395 F.3d 978 (9th Cir. 2003). *Amici* offer this Court particular expertise and wish to clarify that neither purpose nor specific intent are, or have ever been, the accepted standard.

SUMMARY OF ARGUMENT

Under customary international law, aiding and abetting liability requires that an accused knowingly provide substantial assistance to the tortfeasor. This rule has been recognized at least since the post-World War II military tribunals and endures in modern decisions of the international criminal tribunals, which were mandated specifically to apply customary international law.

Analysis of Nuremberg-era jurisprudence confirms that knowledge was the standard applied, leading to both convictions and acquittals. *See, e.g.*, *Trial of Bruno Tesch and Two Others* (*The Zyklon B Case*), 1 Law Reports of Trials of War Criminals 93, 101 (1947) (Brit. Mil. Ct., Hamburg, Mar. 1-8, 1946) (convicting two industrialists who supplied poison gas to Nazis because they "knew" that it would be used to kill concentration camp prisoners); *United States v.*

Von Weizsaecker (The Ministries Case), 14 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 308, 478, 621-22, 784, 854 (1949) (applying a *mens rea* of knowledge to all defendants but acquitting one whose actions did not meet the *actus reus* requirement). The standard that emerged at Nuremberg has been consistently adopted in the intervening decades by international tribunals, including those for the Former Yugoslavia and Rwanda. *See, e.g.*, *Prosecutor v. Furundžija*, Case No. IT-95-17/1/T, Judgment, ¶ 236 (Dec. 10, 1998).

The court below relied on the Rome Statute of the International Criminal Court ("ICC"), July 17, 1998, 2187 U.N.T.S. 3, and a misconception of the Nuremberg-era cases, to reach the erroneous conclusion that the *mens rea* standard for aiding and abetting liability under customary international law is purpose. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009). The Rome Statute, however, does not supersede or restrict existing customary international law. It was drafted for a specific and unique court and resulted from a series of political compromises. Not every provision was intended to reflect customary international law and, accordingly, it expressly states that its provisions should not be read to limit international law. Additionally, the ICC has yet to interpret the particular provision relied upon by the Second Circuit and could reasonably read it to require a knowledge standard. The ambiguity in the Statute affirms that it cannot offer dispositive evidence of a purpose *mens*

rea in customary international law, especially when decades of jurisprudence apply a knowledge standard. Moreover, for group crimes such as those at issue here, the Statute itself expressly provides a knowledge standard, which the court below failed to recognize. Thus, the Second Circuit fundamentally misunderstood the parameters of the Rome Statute and customary international law, and therefore adopted the wrong *mens rea* standard for aiding and abetting liability.

The petition for certiorari raises exceptionally important questions about the scope of liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, after *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Specifically, it presents the question of the proper *mens rea* standard for aiding and abetting liability, which continues to divide and confuse the lower courts. The standard adopted by the Second Circuit would contravene the text, history, and purpose of the ATS by effectively granting immunity to those who knowingly assist egregious human rights violations. Moreover, the approach of the court below is inconsistent with numerous other federal and international decisions adopting a knowledge standard, and would have significant national and international repercussions if allowed to stand. This Court should grant certiorari to clarify that under well-established customary international law, the *mens rea* standard for aiding and abetting liability is knowledge.

ARGUMENT

I. CUSTOMARY INTERNATIONAL LAW REQUIRES ONLY THAT AN AIDER AND ABETTOR ACT WITH THE *MENS REA* OF KNOWLEDGE

A. Nuremberg-era jurisprudence clearly establishes a knowledge standard for aiding and abetting liability

Post-World War II jurisprudence – from both national military courts and the Nuremberg Military Tribunals ("the NMT") – consistently applied a *mens rea* of knowledge for aiders and abettors. This Nuremberg-era jurisprudence informs current understandings of customary international law. The Second Circuit's reliance on a selective and erroneous reading of *United States v. Von Weizsaecker (The Ministries Case)*, 14 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 [Tr. War Crim.] 308 (1949), to establish a purpose requirement[3] threatens to undermine the legacy of Nuremberg and the well-recognized standard under customary international law.

---

[3] In concluding that purpose was the proper standard, the Second Circuit did not consider the numerous cases discussed *infra* and instead relied exclusively on a misreading of Karl Rasche's acquittal in *Ministries*. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (characterizing acquittal as turning on *mens rea* rather than *actus reus*). *Ministries* is discussed in detail below.

A review of Nuremberg-era cases clearly demonstrates that knowledge was the applicable *mens rea* standard. For example, a British military court sentenced to death two industrialists who supplied poison gas to the Nazis because they "*knew* that the gas was to be used for the purpose of killing human beings." *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, 1 Law Reports of Trials of War Criminals 93, 101 (1947) (Brit. Mil. Ct., Hamburg, Mar. 1-8, 1946) (emphasis added); *see also Prosecutor v. Furundžija*, Case No. IT-95-17/1/T, Judgment, ¶ 238 (Dec. 10, 1998) (discussing *Zyklon B*). The purpose standard adopted by the court below – purportedly based on *Sosa* – would lead to the absurd result that these two industrialists, sentenced to death for their crimes, could not be held civilly liable under the ATS. Such a result starkly reinforces the need for this Court to grant certiorari to clarify the parameters of secondary liability under the ATS.

Also applying a knowledge standard, a German court in the French-occupied zone convicted several defendants of aiding and abetting the Gestapo's mass deportation of Jews. *LG Hechingen*, Kls 23/47, Justiz und NS-Verbrechen, Vol. 1, 471 (Lfd. Nr. 022) (June 28, 1947), *translated in Modes of Participation in Crimes Against Humanity*, 7 J. Int'l Crim. Just. 131 (2009). One government official was convicted because he "*knew* what act he was furthering by his participation . . . [and] he *knew* that through his participation he was furthering the principal act." *Id.* at 139 (emphasis added). The trial court found it immaterial

that the accused "regarded the Gestapo measures as 'unjust' to the Jews," because the *mens rea* for an accessory "does not . . . require the accused himself to have acted from racial considerations or from inhumane attitudes." *Id.*[4]

The NMT also applied a knowledge standard to defendants convicted under an aiding and abetting theory of liability. In *United States v. Flick*, 6 Tr. War Crim. 1187 (1947), the NMT convicted Friedrich Flick, a civilian industrialist, because he made vital financial contributions to the SS despite knowledge of their widespread abuses. The NMT noted that Flick "did not approve nor . . . condone the atrocities of the SS," *id.* at 1222, but found that "[o]ne who knowingly by his influence and money contributes to the support [of a violation of the law of nations] must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes," *id.* at 1217.

---

[4] Although a reviewing court applied a different *mens rea* standard on appeal, *see OLG Tübingen*, ss 54/47, Justiz und NS-Verbrechen, Vol. 1, 494, 496-98 (Jan. 20, 1948), *translated in Modes of Participation in Crimes Against Humanity*, 7 J. Int'l Crim. Just. 148, 149-51 (2009), the International Criminal Tribunal for the Former Yugoslavia ("ICTY") cited with favor the *mens rea* applied by the trial court and held that "the high standard" imposed by the appellate court "is not reflected in other cases" and thus not indicative of customary international law. *Furundžija* ¶¶ 240 n.261, 248. The ICTY followed the well-established principle that a single deviation from a long line of precedent does not modify customary international law. *See* Restatement (Third) of Foreign Relations §§ 102(2), 102 cmt. (b) (1987).

In *United States v. Ohlendorf (The Einsatzgruppen Case)*, 4 Tr. War Crim. 411 (1948), the NMT again applied a knowledge *mens rea* standard. Waldemar Klingelhoefer held a variety of roles, including that of an interpreter. He was convicted of crimes against humanity and war crimes. The NMT noted that even if Klingelhoefer had only acted as an interpreter, he would still be criminally liable "as an accessory" because "in locating, evaluating and turning over lists of Communist party functionaries to the executive department of his organization he was *aware* that the people listed would be executed when found." *Id.* at 569 (emphasis added).

Consistent with its reasoning in *Flick* and *Einsatzgruppen*, the NMT reinforced in *Ministries* that the appropriate *mens rea* standard across all relevant theories of criminal liability was knowledge. When examining defendants Von Weizsaecker and Woermann's criminal liability for the deportation of Jews, the NMT explained that they "neither originated [the deportation program], gave it enthusiastic support, nor in their hearts approved of it. The question is whether they knew of the program and whether in any substantial manner they aided, abetted, or implemented it." *Ministries* at 478; *see also id.* at 953 (reiterating on appeal that "inner disapproval is not a defense" for aiding and abetting liability).[5]

---

[5] The NMT also convicted banker Emil Puhl because he "*knew* that what was to be received and disposed of was stolen property and loot taken from the inmates of concentration

(Continued on following page)

Acquittals of alleged aiders and abettors in *Ministries* and other Nuremberg-era cases are also consistent with a knowledge standard. When national military courts and the NMT declined to convict under an aiding and abetting theory, they did so either because the defendant's actions failed to meet the *actus reus* requirement or because the defendant lacked the requisite *mens rea* of knowledge.

Some Nuremberg-era defendants were acquitted on charges of aiding and abetting because they did not possess the necessary *mens rea*. Courts did not acquit because defendants lacked the purpose of facilitating a crime, but rather because they lacked knowledge of the consequences of their assistance. For example, a British military court acquitted defendants Karl Brendle and Eugen Rafflenbeul who, as drivers, substantially assisted other defendants who executed three Allied airmen. *Trial of Franz Schonfeld and Nine Others*, 11 Law Reports of Trials of War Criminals 64, 66-67 (Brit. Mil. Ct., Essen, June 11-26, 1946). Brendle and Rafflenbeul claimed not to have known the aim of the mission and the court acquitted because "[d]espite having made a physical contribution to the commission of the offence, they had no knowledge that they were doing so." *Furundžija* ¶ 239 (discussing *Schonfeld*).

---

camps." *Ministries* at 620 (emphasis added). The Tribunal disavowed a purpose standard, noting that, "[Puhl] neither originated the matter and that it was probably repugnant to him." *Id.* at 620-21.

In *United States v. Krauch (The I.G. Farben Case)*, 8 Tr. War Crim. 1081 (1948), the NMT found that the chemical corporation Degesch, controlled by I.G. Farben, had supplied large quantities of gas used to exterminate concentration camp inmates. In contrast to the defendants in *Zyklon B*, the I.G. Farben executives believed the gas was used to delouse prisoners and did not have "any significant knowledge as to the uses to which its production was being put." *Id.* at 1169. Similarly, although I.G. Farben executives provided anti-typhus drugs used in medical experiments on concentration camp inmates, the NMT was not persuaded that they had the requisite "guilty knowledge" of the Nazis' intentions. *Id.* at 1171-72 (finding it reasonable to believe that there was a "legitimate need for such drugs in these institutions"). The NMT's acquittals in these cases demonstrate that a purpose standard was not applied in Nuremberg-era jurisprudence.

In *Ministries*, the NMT's acquittal of Karl Rasche on some counts hinged on the failure of his actions to meet the *actus reus* requirement. It was on Rasche's acquittal alone that the Second Circuit rested its erroneous conclusion that "international law at the time of the Nuremberg trials recognized aiding and abetting liability only for purposeful conduct." *Talisman*, 582 F.3d at 259 (citing *Ministries* at 662 [sic]). Rasche, a bank director, was alleged to have participated in making loans to support both slave labor and "so-called re-settlement programs." *Ministries* at 621. Noting that a "bank sells money or credit in the same manner as the merchandiser of any other commodity,"

id. at 622, the NMT held that the act of loan-making was insufficient to impose criminal liability under international law.[6] Like "one who sells supplies or raw materials to a builder building a house," a bank, in making a loan, "does not become a partner in enterprise." *Id.* Thus, Rasche's acquittal resulted from inadequate evidence to establish the *actus reus*, not a *mens rea* of purpose.[7]

---

[6] The NMT held:

> Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, *but the transaction can hardly be said to be a crime.* Our duty is to try and punish those guilty of violating international law, and *we are not prepared to state that such loans constitute a violation of that law*, nor has our attention been drawn to any ruling to the contrary.

Ministries at 622 (emphasis added). *See also id.* at 784, 854 (twice reiterating that Rasche's *loan-making* did not constitute criminal conduct).

[7] After concluding that Rasche had knowledge of the loans' use, the Tribunal stated that the "[t]he real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will us[e] the funds in financing enterprises which are employed in using labor in violation of either national or international law?" *Ministries* at 622. The question is conjunctive, containing both an *actus reus* component (making a loan) and a *mens rea* component (with knowledge that the loan will be used to finance an illicit purpose). Because the Tribunal ultimately acquitted Rasche on this count (answering the conjunctive question in the negative), the Second Circuit concluded that a *mens rea* of knowledge was insufficient. It should be apparent, however, that this is not a necessary conclusion, as the acquittal was based on an insufficient *actus reus*.

Post-World War II jurisprudence reflects consistent application of a knowledge standard for aiding and abetting liability. Ignoring the repeated adoption of this standard, the court below relied exclusively on one acquittal in *Ministries* to support its erroneous assertion that Nuremberg-era tribunals applied a purpose standard. This distortion of the case law would effectively rewrite established jurisprudence. This Court should grant certiorari to preserve the Nuremberg legacy and address a question of national and international importance: whether those responsible for the most serious violations will continue to be held accountable under customary international law's well-established knowledge *mens rea* standard.

B. The international criminal tribunals have affirmed and consistently applied a knowledge standard as customary international law

Applying Nuremberg-era jurisprudence, the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR") have repeatedly adopted a knowledge standard. The ICTY is "only empowered to apply" standards that are "beyond any doubt customary law." *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment, ¶ 662 (May 7, 1997) (citation omitted). ICTY judgments are accorded "substantial weight" in determining the content of customary international law. Restatement (Third) of Foreign Relations §103(2)(a) (1987). Indeed, "[t]he fact that

the law applied by the *ad hoc* Tribunals is more than mere statutory law gives their pronouncements particular authority and resonance outside of The Hague and Arusha courtrooms." Guénaël Mettraux, *International Crimes and the* ad hoc *Tribunals* 12 (2005). Decisions of the ICTY and ICTR are "especially helpful for ascertaining the current standard for aiding and abetting under international law as it pertains to the [ATS]." *Doe v. Unocal*, 395 F.3d 932, 950 (9th Cir. 2002), *vacated by grant of en banc review*, 395 F.3d 978 (9th Cir. 2003). *See also Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 274 (2d Cir. 2007) (Katzmann, J., concurring) (noting that ICTY Statute is a "particularly significant" source "intended to codify existing norms of customary international law").

In its first judgment, the ICTY found a "clear pattern" in post-World War II case law requiring a *mens rea* of knowledge. *Tadić* ¶ 674; *see also id.* ¶ 692 ("[T]he accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law."); *see also Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, ¶¶ 325-29 (Nov. 16, 1998) (agreeing with conclusions of the "detailed investigation" in the *Tadic´* judgment). In *Furundžija*, the ICTY again conducted an exhaustive analysis of Nuremberg-era jurisprudence, concluding:

> [I]t is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime. Instead, the clear requirement in the vast majority of [Nuremberg-era] cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime.

Furundžija ¶ 245.

The ICTY has systematically reaffirmed this standard at both the trial and appellate levels, even after the adoption of the Rome Statute of the International Criminal Court ("ICC"), July 17, 1998, 2187 U.N.T.S. 3. *See, e.g.*, *Prosecutor v. Blagojević*, Case No. IT-02-60-A, Judgment, ¶ 127 (May 9, 2007); *Prosecutor v. Simić*, Case No. IT-95-9-A, Judgment, ¶ 86 (Nov. 28, 2006); *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, ¶ 50 (July 29, 2004); *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgment, ¶ 102 (Feb. 25, 2004); *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, ¶ 51 (Sept. 17, 2003) (noting "no cogent reason" to amend knowledge standard); *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 229(iv) (July 15, 1999); *Prosecutor v. Milutinović*, Case No. IT-05-87-T, Judgment, ¶ 94 (Feb. 26, 2009); *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 392 (Feb. 22, 2001).

The ICTR has applied a knowledge standard. *See, e.g.*, *Prosecutor v. Ndindabahizi*, Case No. ICTR-01-71-A, Judgment, ¶ 122 (Jan. 16, 2007); *Prosecutor v. Ntagerura*, Case No. ICTR-99-46-A, Judgment,

¶ 370 (July 7, 2006); *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment, ¶ 180 (Jan. 27, 2000); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 545 (Sept. 2, 1998).

The Special Court for Sierra Leone ("SCSL") also has applied a knowledge standard. *See, e.g.*, *Prosecutor v. Brima,* Case No. SCSL-04-16-A, Judgment, ¶¶ 242-43 (Feb. 22, 2008) (adopting Trial Chamber's conclusion that "[t]he *mens rea* required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would [do so]."); *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Judgment, ¶ 280 (Mar. 2, 2009); *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Judgment, ¶ 231 (Aug. 2, 2007).

This consistent and extensive line of cases from the ICTY, the ICTR, and the SCSL that have been mandated to apply customary international law confirms a knowledge *mens rea* standard for aiding and abetting liability. The implications of the Second Circuit's purpose standard are deeply problematic: the standard used to convict *génocidaires* and war criminals at the modern criminal tribunals would be insufficient to impose civil liability under the ATS.[8]

---

[8] One defendant convicted of crimes against humanity at the ICTY has already mounted an appeal based on the Second Circuit's flawed logic. *See* General Ojdanić's Amended Appeal Brief, Case No. IT-05-87-A, ¶ 280 (Dec. 11, 2009); *see also*

(Continued on following page)

II. THE ROME STATUTE DOES NOT ALTER ESTABLISHED CUSTOMARY INTERNATIONAL LAW OR DICTATE A *MENS REA* OF PURPOSE

The use of the word "purpose" in the Rome Statute (regardless of how it is eventually interpreted by the ICC) does not alter the knowledge *mens rea* standard affirmed through sixty years of customary international law. Interpretation of customary international law requires consulting a multitude of sources, not a single case or statute.[9] The Rome Statute is not a dispositive source of customary international law because: (1) it was drafted for a specific and unique court and resulted from political compromise; (2) not every provision was intended to reflect customary international law; and (3) insofar as the ICC might construe the Statute to include a purpose standard, such a standard would derogate from established international law. Moreover, the provision of the Statute relied upon by the Second Circuit is ambiguous, which affirms that it does not offer authoritative evidence of the *mens rea* standard under

---

General Ojdanić's Reply to the Prosecution's Response to His Second Motion to Amend His Notice of Appeal, Case No. IT-05-87-A, ¶ 12 (Oct. 15, 2009) (seeking to amend challenge to conviction based on Second Circuit's "recent and unequivocal holding as to the content of customary international law").

[9] The Rome Statute is one source but is "not dispositive and do[es] not override the cumulative weight of other evidentiary sources." Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 Hastings L.J. 61, 88 (2008).

customary international law. The ICC has yet to interpret this provision and could reasonably read it as more akin to knowledge than to purpose. Furthermore, the court below ignored the Statute's group crimes provision, which is relevant to this case and contains an explicit knowledge standard. To derive a purpose standard under these circumstances based on one article of the Rome Statute would thus conflict with well-established customary international law.

A. The Rome Statute does not supersede or restrict customary international law

The Rome Statute established a unique court with a specific mandate and limited jurisdiction to hold individuals criminally responsible for egregious crimes. The Statute emerged from a political process: states made a "collection of compromises" rather than analyzing existing customary international law to reach agreement on its provisions. Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* 263 (2002).

The Rome Statute was "never intended, in its entirety, to reflect customary international law." Brief of David J. Scheffer as *Amicus Curiae* in Support of Petitioner and Rehearing en banc at 2, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 07-0016-cv (2d Cir. Oct. 28, 2009) [hereinafter Scheffer

Brief].[10] Specifically, Article 25(3)(c), implicitly relied upon by the court below to establish a purpose standard for aiding and abetting liability, *Talisman*, 582 F.3d at 259, was never understood to reflect customary international law. Article 25(3)(c)'s "purpose" language was the result of political negotiations, not a codification of international law. Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 Nw. U. J. Int'l Hum. Rts. 304, 310-11 (2008); *see also* M. Cherif Bassiouni, 2 *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute* 194-98 (2005) (showing that until the Rome Conference, every proposed draft included "intent" and "knowledge" in brackets); *see also* Scheffer Brief, *supra*, at 4.

Provisions of the Rome Statute that deviate from customary international law concern the ICC alone and do not reflect a collective decision of the drafters to alter or restrict well-established custom. Article 10, which provides that "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute," underscores the "wish to preserve the role of custom in the

---

[10] For example, since the Rome Statute does not recognize claims of sovereign immunity, *see* art. 27, the Statute's drafters "might have set the bar to criminal liability higher than the current state of customary international law, which the Rome Statute does not purport to reflect." Keitner, *supra* note 9, at 88.

development of normative standards of conduct in the area of international criminal justice," Leila Nadya Sadat, *Custom, Codification and Some Thoughts about the Relationship Between the Two: Article 10 of the ICC Statute*, 49 DePaul L. Rev. 909, 912 (2000). Similarly, Article 22(3) notes that the Statute's definition of crimes "shall not affect the characterization of any conduct as criminal under international law independently of this Statute." These articles evidence the drafters' intent to ensure the preservation and development of customary international law independent of the Statute.

The ICC Pre-Trial Chamber has itself recognized the distinctive nature of the Rome Statute and articulated that, at times, the Statute clearly breaks from custom. *See, e.g.*, *Prosecutor v. Katanga*, ICC-01/04-01/07, Pre-Trial Chamber I Decision on the Confirmation of Charges, ¶ 508 (Sept. 30, 2008) (noting that when the Statute expressly provides a mode of liability, the Statute is determinative, and "the question as to whether customary law admits or discards [that liability] is not relevant for this Court"). To the extent that the ICC might interpret the Rome Statute to require a purpose standard, that deviation would not alter the well-settled *mens rea* of knowledge. *See, e.g.*, Paola Gaeta, *Official Capacity and Immunities*, *in* 1 *The Rome Statute of the International Criminal Court: A Commentary* 982, 989 (Antonio Cassese ed., 2002). Thus, because the Rome Statute generally, and Article 25(3)(c) specifically, do not reflect or constrain customary international law, Article 25(3)(c) is not

determinative in an analysis of the proper *mens rea* standard for aiding and abetting liability.

B. The Rome Statute's *mens rea* for aiding and abetting liability remains ambiguous and could reasonably be interpreted by the ICC to reflect a knowledge standard consistent with customary international law

The *mens rea* standard for aiding and abetting liability in the Rome Statute has "yet to be construed by the [ICC]," so "[the Statute's] precise contours and the extent to which it may differ from customary international law thus remain somewhat uncertain." *Khulumani*, 504 F.3d at 275-76 (Katzmann, J., concurring). The court below implicitly relied on Article 25(3)(c) to determine that the Rome Statute requires a purpose standard, yet the meaning of this article remains ambiguous. The Statute never defines "purpose" and the legislative history provides no guidance to interpret this provision.[11] The drafters

---

[11] The Rome Statute certainly does not require specific intent for aiding and abetting liability. Where the Statute requires specific intent, it is explicitly enumerated as an element of the offense. *See, e.g.*, art. 6 ("with intent to destroy"); *see also* Donald K. Piragoff and Darryl Robinson, *Article 30: Mental Element*, *in Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 857-58 (Otto Triffterer ed., 2008). Nevertheless, some courts have relied on the Statute and the Second Circuit's decision to impose a specific intent requirement for aiding and abetting allegations in ATS cases. *See, e.g., Doe v. Drummond Co., Inc.*, No. 08-01041-cv, slip op. at

(Continued on following page)

left elaboration of "soliciting, aiding, abetting, inciting or attempting" offenses for the ICC to determine in particular cases. Maria Kelt and Herman von Hebel, *General Principles of Criminal Law and the Elements of Crimes, in The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* 37 (Roy Lee ed., 2001).

The ICC has yet to resolve the interplay of Article 25(3)(c) with other provisions. First, under Article 25(3)(d)(ii), knowledge is the explicit standard of liability for group crimes: an actor who "contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose" is liable if he made the contribution "in the *knowledge* of the intention of the group to commit the crime." Rome Statute art. 25(3)(d)(ii) (emphasis added). Such group crimes are often the subject of ATS cases, including this one. The court below erred in not considering this article or form of liability. Second, the ICC could reasonably read Article 25(3)(c) to require a knowledge *mens rea*, as the meaning of Article 25(3)(c) should not be determined in isolation. Article 30 establishes a general *mens rea* for criminal liability of "intent and knowledge." This general intent requirement can be met by showing that an individual is "*aware* that [the consequences] will occur

---

17 (N.D. Ala. Nov. 9, 2009) (holding that plaintiff must allege that defendant "*intended to assist* with the specific 67 murders alleged in the complaint") (emphasis in original).

in the ordinary course of events." Rome Statute art. 30(2)(b) (emphasis added). Article 25 should be interpreted in light of these other provisions. *See, e.g.*, Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offenses*, 12 Crim. L. Forum 291, 319 n.98 (Sept. 2001).

Given the interplay of these provisions, the standard for aiding and abetting liability under the Rome Statute could reasonably be read to require knowledge. This unresolved ambiguity affirms that the Statute itself does not offer authoritative evidence of the *mens rea* under customary international law. Moreover, where there is ambiguity, the ICC has indicated that it will consult rules of international law as a persuasive "secondary source" for interpreting the Statute. *Katanga* ¶ 508; *see also* Gerhard Werle, *Principles of International Criminal Law* 108-09 (2005) (stating that to the extent any ambiguities arise in the Rome Statute, these should be resolved to be consistent with customary international law). Customary international law adopts a knowledge standard, which will inform the ICC's interpretation of ambiguous provisions regarding the *mens rea* for aiding and abetting.

III. THIS COURT SHOULD GRANT CERTIORARI TO CONFIRM THAT CUSTOMARY INTERNATIONAL LAW CONTAINS A KNOWLEDGE *MENS REA* STANDARD AND TO PROVIDE NECESSARY GUIDANCE TO THE LOWER COURTS

This case raises exceptionally important issues about the scope of liability under the ATS after *Sosa*. It presents the question of the proper standard for aiding and abetting liability, which continues to divide the lower courts. This standard is of vital importance for plaintiffs, defendants, and governments who take an interest in ATS litigation. The case thus raises crucial issues – requiring this Court's immediate attention – about the interpretation and application of the aiding and abetting standard. The holding of the court below – that the *mens rea* for aiding and abetting liability under customary international law is purpose – threatens to undermine the scope of liability analysis outlined in *Sosa*. The Second Circuit's decision conflicts with established customary international law from the Nuremberg era to the present as well as the holdings of other circuits. This Court should clarify that under customary international law the standard for aiding and abetting liability is knowledge and thereby offer necessary guidance to the lower courts on an issue that continues to confuse and divide them.

This conclusion is bolstered by the fact that experts have voiced particular concern about the decision of the court below. John Ruggie, United Nations

Special Representative to the Secretary-General for Business and Human Rights, has singled out the purpose *mens rea* adopted by the Second Circuit as "absurd":

> as long as an I.G. Farben intended only to make money, not to exterminate Jews, it would make it permissible for such a company to keep supplying a government with massive amounts of Zyklon B poison gas knowing precisely what it is used for.

John Ruggie, Remarks Prepared for International Commission of Jurists Access to Justice Workshop, Johannesburg, South Africa (Oct. 29, 2009) (transcript at www.business-humanrights.org). Ruggie, who has studied this issue for years under his mandate, concluded that "[a]doption of such a standard goes against the weight of international legal opinion." *Id.* Indeed, the standard is knowledge, consistent with the overwhelming body of customary international law.

Allowing the Second Circuit's decision to stand would have drastic and far-reaching implications. First, to abandon knowledge as the *mens rea* standard would contradict the history and aims of international criminal law: to hold accountable perpetrators of the most egregious violations. The knowledge standard recognized at Nuremberg and faithfully adhered to in intervening decades brought justice for heinous crimes. However, under the Second Circuit's misinterpretation of customary international law, the validity of the convictions of industrialists sentenced for

aiding and abetting the Holocaust, as well as war criminals and *génocidaires* sentenced by the modern international criminal tribunals, would be called into question. Moreover, the Second Circuit's decision could lead to the unacceptable result that the modern-day equivalent of Zyklon B industrialists could be held criminally liable but escape civil liability under the ATS.

Second, reading any standard other than knowledge into customary international law risks imposing that standard more broadly, beyond the ATS context. For example, it may become significantly more difficult to hold those who aid and abet terrorists liable, even when they have knowledge of a terrorist group's intent to commit a bombing and contribute by supplying explosives or funds. *See Abecassis v. Wyatt*, No. 09-03884-cv, slip op. at 51 (S.D. Tex. Mar. 31, 2010) (dismissing complaint because allegations did not meet the *Talisman* standard and stating that "[t]he allegation would have to be that the defendants acted with the purpose of assisting terrorists to murder or mai[m] innocent civilians"); *see also* Cassel, *supra*, at 313-14 (referring to the application of art. 2(3)(c) of the International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 37 I.L.M. 249, 2149 U.N.T.S. 256).

Sixty years of established international law consistently applies a knowledge *mens rea* for aiding and abetting liability. Customary international law is born of enduring state practice and international agreement; it must not be recast through selective

analysis and misinterpretation. Review is necessary to prevent the court below from distorting post-World War II jurisprudence and the body of law it fostered at the *ad hoc* international criminal tribunals. The consequences to customary international law of the Second Circuit's erroneous adoption of a purpose standard are too severe for this Court not to intervene.

CONCLUSION

For the above reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

SUSAN H. FARBSTEIN
Counsel of Record
TYLER R. GIANNINI
INTERNATIONAL HUMAN RIGHTS CLINIC
HARVARD LAW SCHOOL
Pound Hall 401
1563 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-9263
sfarbstein@law.harvard.edu
Attorneys for Amici Curiae

April 30, 2010

APPENDIX

LIST OF *AMICI CURIAE*[1]

William Aceves

Professor Aceves is the Associate Dean for Academic Affairs and a Professor of Law at California Western School of Law. He publishes extensively in the fields of human rights and international law. In 2006-2007, Aceves served as the co-chair for the 101st Annual Meeting of the American Society of International Law. He has appeared before the Inter-American Commission on Human Rights, the United Nations Special Rapporteur on Migrants, and the United States Commission on Civil Rights.

Philip Alston

Professor Alston is the John Norton Pomeroy Professor of Law and Chair of the Center for Human Rights and Global Justice at New York University School of Law. He teaches international law and has published widely on international law and human rights, including co-authoring a leading textbook in this field. Alston has held a range of senior United Nations appointments for well over two decades, including, since 2004, United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions.

---

[1] Affiliations are provided for identification purposes only.

M. Cherif Bassiouni

Professor Bassiouni is a Distinguished Research Professor of Law Emeritus at DePaul University College of Law and President Emeritus of the law school's International Human Rights Law Institute. He has served the United Nations in a number of capacities, including as Vice-Chairman of the General Assembly's Ad Hoc and Preparatory Committees on the Establishment of an International Criminal Court and Chairman of the Drafting Committee of the 1998 Diplomatic Conference on the Establishment of an International Criminal Court. He has authored numerous books and articles in the fields of international criminal law, comparative criminal law, and international human rights law.

Douglass Cassel

Professor Cassel is the Lilly Endowment Professor of Law at Notre Dame Law School and Director of its Center for Civil and Human Rights. He is a member of the Executive Council of the American Society of International Law and served as a consultant to the American Bar Association President on the International Criminal Court. He has also served as president of international organizations assisting justice reform in the Americas, and has been a consultant on human rights to numerous non-governmental organizations as well as to the United Nations, the Organization of American States, and the United States Department of State. He has published widely

in the fields of international human rights, international criminal law, and international humanitarian law.

Roger S. Clark

Professor Clark is the Board of Governors Professor at Rutgers University School of Law. He was a member of the United Nations Committee on Crime Prevention and Control from 1986-1990, and has authored or co-authored numerous articles and books on international law. He participated in the negotiations to create the International Criminal Court and has been active in the Court's Working Group.

David M. Crane

Professor Crane is a Professor of Practice at the College of Law, Syracuse University. From 2002-2005, he was the founding Chief Prosecutor of the Special Court for Sierra Leone, appointed to that position by the Secretary-General of the United Nations. Professor Crane was the first American since Justice Robert Jackson and Telford Taylor at Nuremberg to be the Chief Prosecutor of an international war crimes tribunal. Professor Crane previously served over thirty years in the United States government.

John Dugard

Professor Dugard is a Professor of International Law at the Centre for Human Rights, University of

Pretoria, South Africa and at University of Leiden, Netherlands. From 2002-2008, he was an Ad Hoc Judge on the International Court of Justice. He is a Member of the United Nations International Law Commission and has previously served as a Special Rapporteur for both the United Nations Commission on Human Rights and the International Law Commission.

Richard Goldstone

Professor Goldstone is a former South African Constitutional Court justice, and served as the first Chief Prosecutor of the United Nations International Criminal Tribunals for the Former Yugoslavia and Rwanda. He also served as chairperson of the International Task Force on Terrorism for the International Bar Association. Among other academic positions, he has been the Henry Shattuck Visiting Professor Law at Harvard Law School, a Global Visiting Professor of Law at New York University School of Law, and both the William Hughes Mulligan and Bacon-Kilkenny Distinguished Visiting Professor of Law at Fordham Law School.

Ved Nanda

Professor Nanda is the John Evans University Professor, Thompson G. Marsh Professor of Law, and Director of the International Legal Studies Program at the University of Denver, Sturm College of Law. He is Past President of the World Jurist Association,

and former honorary Vice President of the American Society of International Law. He currently serves as Honorary President of the World Jurist Association and Honorary Vice-President of the International Law Association, American Branch. He was formerly the United States Delegate to the World Federation of the United Nations Associations, Geneva, Vice-Chair of its Executive Council, and on the Board of Directors of the United Nations Association of the United States of America.

Sheri Rosenberg

Professor Rosenberg is a Professor of Clinical Law and Director of the Program in Holocaust and Human Rights Studies, as well as Director of the Human Rights and Genocide Clinic, at the Benjamin M. Cardozo School of Law. She has worked in the areas of civil rights and international human rights with a specific focus on issues of discrimination, equality, and genocide. In 2000, Professor Rosenberg was one of two United States lawyers to work for the Human Rights Chamber, a quasi-international court established under the Dayton Peace Agreement in Bosnia and Herzegovina.

Leila Nadya Sadat

Professor Sadat is the Henry H. Oberschelp Professor of Law and Director of the Whitney R. Harris World Law Institute at the Washington University School of Law. She is an internationally recognized authority

on international criminal law and human rights and a prolific scholar, publishing in leading journals in the United States and abroad. She was a delegate to the 1998 diplomatic conference in Rome at which the International Criminal Court was established.

Patricia Viseur Sellers

Ms. Sellers is a Fellow at Kellogg College, Oxford University and an independent Legal Consultant in international criminal law and humanitarian law. She served as Legal Advisor for Gender-Related Crimes and Acting Senior Trial Attorney for twelve years at the International Criminal Tribunal for the Former Yugoslavia, including from 1998-2002 as Deputy Head of the Legal Advisory Section.

Dinah Shelton

Professor Shelton is the Manatt/Ahn Professor of International Law at the George Washington University Law School. She has authored numerous articles and books on international law, human rights law, and international environmental law. She is a member of the board of editors of the American Journal of International Law and is a Vice-President of the American Society of International Law. She has served as a legal consultant to the United Nations Environment Programme, United Nations Institute of Training and Research, World Health Organization, European Union, Council of Europe, and Organization of American States.

Beth Stephens

Professor Stephens is Professor of Law at Rutgers University School of Law. She has published a variety of articles and books on the relationship between international and domestic law, focusing on the enforcement of international human rights norms through domestic courts. In 1995, Professor Stephens received the Trial Lawyer of the Year Award from Trial Lawyers for Public Justice in recognition of her work litigating international human rights claims.

Beth Van Schaack

Professor Van Schaack is Associate Professor of Law at Santa Clara University School of Law. She teaches and publishes in the fields of international law, international criminal and humanitarian law, and human rights. She worked in the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia from 1997-1998, and has served as Legal Advisor to the Documentation Centre of Cambodia since 1996.

David Weissbrodt

Professor Weissbrodt is Regents Professor and Fredrikson & Byron Professor of Law at the University of Minnesota Law School. He is a distinguished and widely published scholar of international human rights law. From 1996-2003, he served as a member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights and was

elected Chairperson of the Sub-Commission from 2001-2002. He was also designated the United Nations Special Rapporteur on the Rights of Non-Citizens from 2000-2003. In 2005, he was selected as a member of the Board of Trustees of the United Nations Trust Fund for Contemporary Forms of Slavery, and in 2008 he was elected Chairperson of the Board.

162

No. 09-1262

Supreme Court, U.S.
FILED
MAY 20 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

PRESBYTERIAN CHURCH OF THE SUDAN, ET AL.,

Petitioners,

v.

TALISMAN ENERGY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE* NUREMBERG SCHOLARS OMER BARTOV, MICHAEL J. BAZYLER, DONALD BLOXHAM, CHRISTOPHER BROWNING, VIVIAN CURRAN, LAWRENCE DOUGLAS, HILARY EARL, HON. BRUCE J. EINHORN, RET., DAVID FRASER, STANLEY A. GOLDMAN, GREGORY S. GORDON, MICHAEL J. KELLY, MATTHEW LIPPMAN, MICHAEL MARRUS, FIONNUALA D. NÍ AOLÁIN, BURT NEUBORNE, PIER PAOLO RIVELLO, AND CHRISTOPH J.M. SAFFERLING IN SUPPORT OF PETITIONERS

JENNIFER GREEN
Associate Professor
Director, Human Rights Litigation and International Advocacy Clinic
UNIVERSITY OF MINNESOTA LAW SCHOOL
225 19th Avenue South
Minneapolis, MN 55455
jmgreen@umn.edu
612-625-7247

MICHAEL BAZYLER
Counsel of Record
Professor of Law and The "1939" Club Law Scholar in Holocaust and Human Rights Studies
CHAPMAN UNIVERSITY SCHOOL OF LAW
1 University Drive
Orange, CA 92866
bazyler@chapman.edu
714-628-2500

Counsel for Amici Curiae

May 20, 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. CUSTOMARY INTERNATIONAL LAW AS FORMULATED AND APPLIED AT NUREMBERG PROVIDES A KNOWLEDGE STANDARD FOR AIDING AND ABETTING LIABILITY 4

A. Nuremberg-Era British and French Military Courts Found that Knowledge Was the Proper *Mens Rea* for Aiding and Abetting Liability 5

B. The American Nuremberg Military Tribunals Similarly Held that Knowledge Is the Proper *Mens Rea* for Aiding and Abetting Liability 8

II. *THE MINISTRIES CASE* IS CONSISTENT WITH THE BODY OF NUREMBERG JURISPRUDENCE, ADOPTING A KNOWLEDGE STANDARD FOR AIDING AND ABETTING LIABILITY 11

CONCLUSION 16

APPENDIX

List of *Amici Curiae* ..... App. 1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

The Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) ..... *passim*

INTERNATIONAL CASES

Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Roechling, Judgment on Appeal to the Superior Military Government Court of the French Occupation Zone in Germany (Roechling Judgment on Appeal), 14 Trials of War Criminals Before the Nuernberg Tribunals Under Control Council Law No. 10 1097 (1949) ..... *passim*

In re Tesch (The Zyklon B Case), 13 Int'l L. Rep. 250 (Brit. Mil. Ct., Hamburg, Mar. 1-8, 1946) 5, 11

Trial of Franz Schonfeld and Nine Others, 11 Law Reports of Trials of War Criminals 69 (Brit. Mil. Ct., Essen, June 11-26, 1946) 6

Trial of Josef Kramer and Forty-Four Others (The Belsen Trial), 2 War Crimes Trials (Raymond Phillips ed., 1949) 6

Trial of Werner Rhode and Eight Others, 5 Law Reports of Trials of War Criminals 54 (Brit. Mil. Ct., Wuppertal, May 39-June 1, 1946) 6

TABLE OF AUTHORITIES – Continued

Page

United States v. Flick (*The Flick Case*), 6 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 1187 (1947).....10

United States v. Krauch (*The I.G. Farben Case*), 8 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 1081 (1948).....10

United States v. Otto Ohlendorf (*The Einsatzgruppen Case*), 4 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 1 (1949) 9

United States v. Von Weizsaecker (*The Ministries Case*), 14 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 (1949).....*passim*

OTHER AUTHORITIES

Matthew Lippmann, *War Crimes Trials of German Industrialists: The "Other Schindlers,"* 9 Temp. Int'l & Comp. L.J. 173, 181-82 (1995) 5

INTEREST OF *AMICI CURIAE*[1]

Sixty-five years ago this month – on May 8, 1945 – Nazi Germany unconditionally surrendered and the Second World War ended in Europe. Even as the war was ending, the Allies began preparing to bring the Nazi leaders to justice. On May 2, 1945, President Harry Truman announced that Justice Robert H. Jackson would be taking a temporary leave from the Supreme Court to serve as the U.S. Chief of Counsel in what eventually became known as the International Military Tribunal (IMT), which held its trial from November 1945 to October 1946 of twenty-two high-ranking Nazi officials in Nuremberg, located in the American zone of occupied Germany. After the IMT trial, Justice Jackson returned to the Supreme Court and Brigadier General Telford Taylor succeeded Jackson as Chief of Counsel, to oversee from 1945 to 1948 twelve additional trials of lesser-ranking Nazis pursuant to Control Council Law No. 10. The trials were held in Nuremberg's Palace of Justice, where the original IMT was conducted, and are known as

---

[1] This brief is submitted pursuant to Supreme Court Rule 37 in support of Petitioners. Counsel of record for all parties received notice at least ten days prior to the due date of the *amici*'s intention to file this brief. The parties have consented to the filing of this brief, and such consents have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

the Nuremberg Military Trials (NMT). The British, French, and Soviet allies of the United States conducted similar trials in their own respective occupied zones of Germany pursuant to Control Council Law No. 10.

The jurisprudence that emerged from Nuremberg and the subsequent Nuremberg-era zonal trials remains the core of customary international criminal law today. On November 11, 2005, the International Law Section of the American Bar Association commemorated the 60th anniversary of the commencement of the IMT trial by holding a conference in Washington, D.C., which it rightfully titled: "Nuremberg and the Birth of International Law."[2]

Amici curiae – listed in the Appendix – are experts on the Nuremberg-era trials. They comprise professors from three disciplines: law, history, and political science. *Amici* submit this brief to inform the Court of a grave error made by the Second Circuit in its *Talisman* opinion, presently before this Court on a petition for a writ of certiorari. Specifically, the *Talisman* court held that the correct *mens rea* standard that the international judges in occupied Germany required to convict various Nazi defendants in the dock was "purpose" – where in fact the *mens rea* standard was "knowledge."

---

[2] The conference is available for viewing on C-SPAN at http://www.c-spanvideo.org/program/189880-1.

Amici can offer the Court unique expertise on this issue and are concerned that the recent *Talisman* Panel decision distorts the legacy of Nuremberg and, in doing so, misconstrues customary international law. Given the singular importance of Nuremberg, it is particularly crucial that this Court conduct a thorough review of its jurisprudence and adopt the proper standard for aiding and abetting liability.

SUMMARY OF ARGUMENT

The *Talisman* Panel relies upon a mischaracterization of certain language relating to a single defendant in one Nuremberg case (*The Ministries Case*) to reach the erroneous conclusion that the *mens rea* standard for aiding and abetting liability under customary international law is purpose rather than knowledge. *The Presbyterian Church of Sudan, et al. v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) ("[A]pplying international law . . . the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone."). A detailed analysis of Nuremberg-era jurisprudence confirms, however, that knowledge was the standard applied in all cases, leading to both convictions and acquittals. *The Ministries Case*, cited but not adequately considered by the Panel, does not alter this principle. *United States v. Von Weizsaecker* (*The Ministries Case*), 14 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 308 (1949) ("Tr. War Crim."). In that case,

the Tribunal applied a *mens rea* of knowledge to all defendants but acquitted one whose actions did not meet the *actus reus* requirement. A thorough examination of Nuremberg jurisprudence makes abundantly clear that this body of law on aiding and abetting criminal liability requires *knowingly* providing substantial assistance to the perpetrator.

ARGUMENT

I. CUSTOMARY INTERNATIONAL LAW AS FORMULATED AND APPLIED AT NUREMBERG PROVIDES A KNOWLEDGE STANDARD FOR AIDING AND ABETTING LIABILITY

The cases emerging from trials of Nazi war criminals after the Second World War required that an aider and abettor act with the *mens rea* of knowledge. Despite this overwhelming body of law, the *Talisman* Panel relied upon a single defendant in a single case (*The Ministries Case*) to hold that "international law at the time of the Nuremberg trials recognized aiding and abetting liability only for purposeful conduct." *Talisman*, 582 F.3d at 259. However, a survey of Nuremberg-era jurisprudence leads to the contrary but correct conclusion that knowledge is the standard.

A. Nuremberg-Era British and French Military Courts Found that Knowledge Was the Proper *Mens Rea* for Aiding and Abetting Liability

In *The Zyklon B Case*, a British military court sentenced to death two industrialists who supplied poison gas to the Nazis "with *knowledge*" that it would be used to kill concentration camp prisoners. *See In re Tesch* (*The Zyklon B Case*), 13 Int'l L. Rep. 250 (1947) (Brit. Mil. Ct., Hamburg, Mar. 1-8, 1946) (emphasis added); *see also* Matthew Lippmann, *War Crimes Trials of German Industrialists: The "Other Schindlers,"* 9 Temp. Int'l & Comp. L.J. 173, 181-82 (1995). Counsel for the defendant Tesch argued that "since the accused was not charged with the extermination of human beings but merely with supplying the means of doing so, his conduct would be contrary to the laws and usages of war only if it could be shown that Zyklon B gas was necessarily intended for such extermination." 13 Int'l L. Rep. at 252. However, the Judge Advocate rejected that principle and stated that the three facts that needed to be proven were that Allied nationals had been gassed by Zyklon B, that the accused's firm had supplied the gas and third, "that the accused *knew* that the gas was to be used for the purpose of killing human beings." *Id.* (emphasis added).[3] The defendants were convicted on this basis.

---

[3] "The duty of the Judge Advocate is to advise the Court on matters of law both substantive and procedural, and to sum up

(Continued on following page)

In another case, in the *Trial of Werner Rhode and Eight Others*, the Judge Advocate provided the example of an individual who "was not actually present when the murder was done, if he was taking part . . . with the *knowledge* that the other man was going to put the killing into effect, then he was just as guilty as the person who fired the shot or delivered the blow." 5 Law Reports of Trials of War Criminals 54 (Brit. Mil. Ct., Wuppertal, May 39 – June 1, 1946) (emphasis added).

The knowledge standard is by no means a low bar to liability. In *Schonfeld*, another British military court acquitted two drivers who had provided substantial assistance by driving men to a house where they executed three Allied airmen, because both drivers claimed to have followed instructions without knowing the aim of the mission. Despite the physical contribution to the crime, the accused had no knowledge of the contribution to the offence and they were thus acquitted. *Trial of Franz Schonfeld and Nine Others*, 11 Law Reports of Trials of War Criminals 64, 66-67 (Brit. Mil. Ct., Essen, June 11-26, 1946).

That knowledge was a sufficient and appropriate standard to convict individuals in the Nuremberg-era tribunals is confirmed by the Judgment on Appeal of January 25, 1949 of the Superior Military

---

the case. He takes no part in the decision of the Court." *Trial of Josef Kramer and Forty-Four Others* (*The Belsen Trial*), 2 War Crimes Trials xxxiv (Raymond Phillips ed., 1949).

Government Court of the French Occupation in Germany in the *Roechling* case. *Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Roechling, Judgment on Appeal to the Superior Military Government Court of the French Occupation Zone in Germany* (*Roechling Judgment on Appeal*), 14 Tr. War Crim. 1097 (1949). The French military government in occupied Germany put on trial the industrialist Hermann Roechling and four of his associates in the Roechling iron and steel concern. The Tribunal confirmed in an initial section titled "Fundamental Considerations" that an individual can be convicted under jurisprudence developed by the IMT solely on the basis of the individual's knowledge of the criminal activity. In fact, the French appellate tribunal went further and noted that guilt can be based even on presumed knowledge, using the standard of criminal negligence.[4]

The French appellate tribunal then confirmed the conviction of Hermann Roechling, head of the

---

[4] "*The defense of lack of knowledge* – No superior may prefer this defense indefinitely; for it is his duty to know what occurs in his organization, and lack of knowledge, therefore, can only be the result of criminal negligence. For the rest, the acceptance of superior orders on the other hand, and the lack of knowledge as to their execution by subordinates, on the other, would lead to the abolishment of any penalty; the executing agents would seek cover behind his lack of knowledge and say: 'I had no knowledge of that.'" *Roechling Judgment on Appeal*, at 1106.

Roechling concern, for war crimes based on a number of criminal acts, all of which used the *mens rea* of knowledge or presumed knowledge. First, Roechling was convicted of war crimes for taking over and profiting from the factories in Nazi-occupied Poland and then in Nazi-occupied France, including knowingly accepting stolen goods, *id.* at 1113, and improper seizure of booty goods. *Id.* at 1117-18. The appellate tribunal also found Roechling guilty of war crimes for the inhumane use of forced labor in his factories – likewise based on the knowledge standard. According to the Tribunal, Hermann Roechling, as "the chairman of the RVE [the Reich Association of Iron] *knew* in what way such foreign workers were supplied." *Id.* at 1130 (emphasis added).

The Appellate Tribunal also found Roechling's son-in-law Lothar von Gemmingen-Hornberg guilty of war crimes on the basis that von Gemmingen-Hornberg, as the president of the board of directors of the Roechling company, knew of the inhumane treatment of the deported workers in the Roechling plant, had authority to change that labor regime, but did nothing about it. *Id.* at 1136.

B. The American Nuremberg Military Tribunals Similarly Held that Knowledge Is the Proper *Mens Rea* for Aiding and Abetting Liability

The Nuremberg Military Tribunals created by the United States in its occupied zone in the aftermath of

the IMT trial likewise applied a knowledge standard in the twelve subsequent Nuremberg trials held pursuant to Control Council Law No. 10.

In the *Einsatzgruppen* trial [Trial No. 9], defendant Waldemar Klingelhoefer, an interpreter for and commander of the Nazi mobile killing squads in the Soviet Union, was convicted because he was "*aware* that the people [whose names of Communist party functionaries he discovered through his Russian-language interrogations and gave to his superiors] would be executed when found." 4 Tr. War Crim. 569 (1949). Even though the tribunal noted that Klingelhoefer was also an "active leader and commander," it also noted that "[i]n this function [of interpreter], therefore, he served as an accessory to the crime" since his interpreting skills facilitated executions. *Id.*

Defendant Lothar Fendler, an intelligence officer whose primary function was to draft intelligence reports, likewise was convicted because he "*knew* that [summary] executions were taking place" and failed to intervene though "[i]t is not contended by the Prosecution, nor does the evidence show that Fendler, himself, ever conducted an execution." *Id.* at 208 (emphasis added). The fact that the *mens rea* of knowledge was sufficient to convict Fendler is confirmed by the Tribunal's rejection of the "I didn't know" defense: "Fendler asserted over and over that he only learned by accident of executions and that, generally, he did not know what was taking place. Fendler's assertion runs counter to normal every day experience because it is simply incredible that a

high-ranking officer in a unit would not know of the principal occupation of that unit." *Id.*

Defendant Heinz Jost, as head of Einsatzgruppen A, was convicted because he was "*aware* of the criminal purpose to which that organization was put, and, as its commander, cannot escape responsibility for its acts." *Id.* at 134 (emphasis added).

In *United States v. Flick* [Trial No. 5], the Tribunal convicted two defendants for knowingly assisting the Nazis. Flick, a civilian industrialist, was convicted because he knew of the criminal activities and widespread abuses of the SS and nevertheless contributed money that was vital to its financial existence. Although Flick did not condone SS abuses, the Tribunal found that "[o]ne who *knowingly* by his influence and money contributes to the support [of a violation of the law of nations] thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes." 6 Tr. War Crim. 1217 (1947) (emphasis added). Flick and one of his employees were also convicted for increasing the company's production quotas, knowing that forced labor would be required to meet this increase, even though they never "exerted any influence or took any part in the formation, administration or furtherance of the slave-labor program." *Id.* at 1198.

Similarly, in *United States v. Krauch* [Trial No. 6], I.G. Farben executives were acquitted because they did not "*knowingly* participate in the planning, preparation or initiation of an aggressive war." 8 Tr. War

Crim. 1117 (1952) (emphasis added). In contrast to the defendants in *Zyklon B*, Krauch and others honestly believed that the poison gas they manufactured was used to delouse prisoners and were unaware of the "criminal purposes to which this substance was being put." *Id.* at 1168-69 ("The evidence does not warrant the conclusion that the executive board or the defendants . . . [had] any significant *knowledge* as to the uses to which its production was being put.") (Emphasis added). I.G. Farben pharmaceutical executives charged with sending experimental vaccines to the SS were acquitted because they lacked "guilty *knowledge*" that the SS would infect concentration camp inmates to test the drug. *Id.* at 1171 (emphasis added).

Throughout the Nuremberg-era jurisprudence, the decisions make clear that knowledge was the standard for aiding and abetting and the Second Circuit clearly erred in concluding otherwise.

II. *THE MINISTRIES CASE* IS CONSISTENT WITH THE BODY OF NUREMBERG JURISPRUDENCE, ADOPTING A KNOWLEDGE STANDARD FOR AIDING AND ABETTING LIABILITY

The *Talisman* Panel did not consider the preceding cases and relied on a mischaracterization of *The Ministries Case* [Trial No. 11] to conclude that purpose is the proper standard for aiding and abetting liability. *Talisman*, 582 F.3d at 259 (characterizing the

case as "declining to impose criminal liability on a bank officer who made a loan with the knowledge, but not the purpose, that the borrower would use the funds to commit a crime") (citing *The Ministries Case* at 662 [sic]). *The Ministries Case* therefore merits careful review, as the *Talisman* Panel failed to recognize that banker Karl Rasche's acquittal for complicity in forced labor did not rest on the application of a *mens rea* of purpose, but rather on the fact that his actions did not meet the requisite *actus reus*.

The Tribunal in *The Ministries Case* conducted distinct *mens rea* and *actus reus* analyses. The Tribunal first applied a knowledge standard to the *mens rea* inquiry and determined that Rasche met that standard because he knew that the loan was being used to facilitate slave labor:

> Bankers do not approve or make loans in the number and amount made by the Dresdner Bank without ascertaining, having, or obtaining information or knowledge as to the purpose for which the loan is sought, and how it is to be used. It is inconceivable to us that the defendant did not possess that *knowledge*, and we find that he did.

The Ministries Case at 622 (emphasis added). Only upon reaching this conclusion did the Tribunal then consider whether the *actus reus* requirement had also been met:

> The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will us[e] the funds

> in financing enterprises which are employed in using labor in violation of either national or international law? . . . Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint . . . but the *transaction can hardly be said to be a crime*. Our duty is to try and punish those guilty of violating international law, and *we are not prepared to state that such loans constitute a violation of that law*.

Id. (emphasis added). The Tribunal's discussion thus emphasized the nature of the act, focusing on whether the loans themselves constituted a violation of international law. The Tribunal neither determined whether Rasche intended to further the crimes nor suggested that such intent would give rise to liability. Thus, in acquitting Rasche, the Tribunal did not apply a purpose *mens rea*; it merely concluded that the acts in question did not constitute a crime.

It is noteworthy that in the same trial the Tribunal convicted banker Emil Puhl because he "*knew* that what was to be received and disposed of was stolen property and loot taken from the inmates of concentration camps." *Id.* at 620 (emphasis added). The Tribunal continued that "long before the deliveries were completed" Puhl was "*informed* that the grisly dental gold and wedding rings were part of it." *Id.* (emphasis added). The Tribunal again disavowed a purpose standard, noting that Puhl "neither originated the matter and that it was probably repugnant to him." *Id.* at 620-21. The Tribunal would not and

did not apply a purpose standard to one defendant and a knowledge standard to another in the same case, on the same charges, and based on substantially similar facts.

As in Rasche's case, after concluding that the *mens rea* standard was met, the Tribunal then considered whether Puhl's alleged acts rose to the level of a violation of international law, noting that the "defendant contends that stealing the personal property of Jews . . . is not a crime against humanity." *Id.* at 611. The Tribunal determined that, in contrast to Rasche, Puhl's actions did constitute a crime:

> It would be a strange doctrine indeed, if, where part of the plan and one of the objectives of murder was to obtain the property of the victim, even to the extent of using the hair from his head and the gold of his mouth, he who *knowingly* took part in disposing of the loot must be exonerated. . . . Without doubt all such acts are crimes against humanity.

Id. (emphasis added). The divergent outcomes – Puhl's conviction and Rasche's acquittal – in this single case thus hinge not on inconsistent *mens rea* standards but rather on the differing nature of the *actus reus* of the defendants.

The Tribunal expressly adopted a knowledge standard for other defendants in *The Ministries Case* as well:

> Von Weizsaecker or Woermann neither originated [the deportation program of Jews], gave it enthusiastic support, nor in their hearts approved of it. The question is whether they *knew* of the program and whether in any substantial manner they aided, abetted or implemented it.

Id. at 478 (emphasis added). Thus, *The Ministries Case* consistently applied a knowledge standard for aiding and abetting liability. The Rasche verdict did not conflict with this standard; the Tribunal found that the requisite *mens rea* of knowledge had been met but acquitted him on the basis that his actions did not meet the *actus reus* requirement.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the Second Circuit Panel erred in concluding that Nuremberg-era jurisprudence applied a purpose rather than a knowledge standard for aiding and abetting liability. *Amici* urge review to correct this fundamental misunderstanding and to adopt the knowledge standard mandated by customary international law.

Dated: May 20, 2010

MICHAEL BAZYLER
Counsel of Record
Professor of Law and
The "1939" Club Law Scholar in
Holocaust and Human Rights Studies
CHAPMAN UNIVERSITY SCHOOL OF LAW
1 University Drive
Orange, CA 92866
bazyler@chapman.edu
714-628-2500

JENNIFER GREEN
Associate Professor
Director, Human Rights Litigation and
International Advocacy Clinic
UNIVERSITY OF MINNESOTA LAW SCHOOL
225 19th Avenue South
Minneapolis, MN 55455
jmgreen@umn.edu
612-625-7247

APPENDIX

LIST OF *AMICI CURIAE*[1]

Omer Bartov

Professor Bartov is the Chair of the Department of History, John P. Birkelund Distinguished Professor of European History and Professor of History and Professor of German Studies at Brown University and is the author of seven books and the editor of three volumes on the Holocaust; his work has been translated into several languages. Born in Israel and educated at Tel Aviv University and St. Antony's College, Oxford, Omer Bartov began his scholarly work with research on the Nazi indoctrination of the German Wehrmacht under the Third Reich and the crimes it committed during the war in the Soviet Union. This was the main concern of his books, *The Eastern Front, 1941-1945* (St. Antony's College Series, 2001); and *Hitler's Army: Soldiers, Nazis and War in the Third Reich* (Oxford University Press, 1991). He has also studied the links between World War I and the genocidal policies of World War II, as well as the complex relationship between violence, representation, and identity in the twentieth century. His books *Murder in Our Midst: The Holocaust, Industrial Killing, and Representation* (Oxford University Press, 1996); *Mirrors of Destruction: War, Genocide and Modern Identity* (Oxford University Press, 2000); and *Germany's War and the Holocaust* (Cornell University

---

[1] Affiliations are provided for identification purposes only.

Press, 2003) have all been preoccupied with various aspects of these questions.

Michael J. Bazyler

Professor Bazyler is Professor of Law and The "1939" Club Law Scholar in Holocaust and Human Rights Studies at Chapman University School of Law. He is also a research fellow at the Holocaust Education Trust in London and the holder of previous fellowships at the United States Holocaust Memorial Museum and Yad Vashem in Jerusalem (The Holocaust Martyrs' and Heroes' Remembrance Authority of Israel), where he was the holder of the *Baron Friedrich Carl von Oppenheim Chair for the Study of Racism, Antisemitism and the Holocaust.* He is the author of numerous books, book chapters and articles on the relationship of law and the Holocaust, including *Holocaust Justice: The Battle for Restitution in America's Courts* (New York University Press, 2003) and the forthcoming *Forgotten Trials of the Holocaust* (University of Wisconsin Press).

Donald Bloxham

Professor Bloxham is Professor of Modern History at the School of History, Classics and Archaeology at the University of Edinburgh. He is the author of *The Final Solution: A Genocide* (Oxford University Press, 2009); *The Great Game of Genocide: Imperialism, Nationalism, and the Destruction of the Ottoman Armenians* (Oxford University Press, 2005); *Genocide*

on Trial: War Crimes Trials and the Formation of Holocaust History and Memory (Oxford University Press, 2001); and co-author, with Tony Kushner, of *The Holocaust: Critical Historical Approaches* (Manchester University Press, 2005). With Ben Flanagan, he is the editor of *Remembering Belsen: Eyewitnesses Recall the Liberation* (Vallentine, Mitchell and Co., 2005). With Mark Levene, he is a series editor of the ten-volume Oxford University Press monograph series entitled *Zones of Violence*, and is an editor, with A. Dirk Moses, of the forthcoming Oxford University Press *Handbook of Genocide*. Formerly an editor of the *Journal of Holocaust Education*, the Vallentine Mitchell and Co. *Library of Holocaust Testimonies* and the *Holocaust Educational Trust Research Papers*, he is also on the editorial board of four journals – *Holocaust Studies*, *Patterns of Prejudice*, *Zeitschrift für Genozidforschung*, and the *Journal of Genocide Research*. He also serves on the board of foreign correspondents of the journal *900. Per una storia del tempo presente*.

Christopher Browning

Professor Browning joined the University of North Carolina-Chapel Hill faculty in the Fall of 1999. His publications include: *Origins of the Final Solution: The Evolution of Nazi Jewish Policy, September 1939-March 1942* (University of Nebraska Press, 2004); *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (HarperCollins, 1992); *The*

Path to Genocide (Cambridge University Press, 1992); *Fateful Months: Essays on the Emergence of the Final Solution* (Holmes & Meier, 1985); and *The Final Solution and the German Foreign Office* (Holmes & Meier, 1978). In the Spring of 1999, he gave the George Macaulay Trevelyan Lectures at Cambridge University, which have been published under the title *Nazi Policy, Jewish Workers, German Killers* (Cambridge University Press, 2000). In the spring of 2002, he delivered the first of the George Mosse Lectures at the University of Wisconsin, which has been published as *Collected Memories: Holocaust History and Postwar Testimony* (University of Wisconsin Press, 2003). He is also working on a case study, based on nearly 265 survivor testimonies, of the Jewish factory slave labor camps in Starachowice in central Poland.

Vivian Curran

Professor Curran is Professor of Law at the University of Pittsburgh, where she writes and teaches in the areas of comparative, transnational and international law. She has an undergraduate degree from the University of Pennsylvania, and a Ph.D. and J.D. from Columbia University. She is an elected member of the American Law Institute, the International Academy of Comparative Law, and is a past Secretary of the American Society of Comparative Law. In 2004, she was appointed by the State Department as United States member of the Austrian General Settlement Fund Committee to

adjudicate compensation claims for Nazi-era property expropriations in Austria. The Austrian government decorated her for her work with the *große goldene Ehrenzeichen* in 2007. In 2009, she founded an interdisciplinary studies emphasis at the University of Pittsburgh School of Law on the Holocaust and Crimes against Humanity. A significant amount of her scholarly writing has focused on German and French law during the Holocaust and post-war trials of Nazi-era criminals. She has served as an expert in cases dealing with the law of Vichy France, French law and international law.

Lawrence Douglas

Professor Douglas is the James J. Grosfeld Professor of Law, Jurisprudence and Social Thought at Amherst College. He holds degrees from Brown (A.B.), Columbia (M.A.), and Yale Law School (J.D.); and has received major fellowships from the Institute for International Education (ITT-Fulbright) and the National Endowment for the Humanities. He is the author of three books: *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press, 2001), a widely acclaimed study of war crimes trials; *Sense and Nonsensibility* (Simon and Schuster, 2004), a parodic look at contemporary culture co-authored with Amherst colleague Alexander George, and *The Catastrophist* (Other Press, 2006; Harcourt, 2007), a novel. In addition, he has co-edited ten books on current legal topics. His writings have appeared in

numerous journals and magazines including *The Yale Law Journal*, *Representations*, *The New Yorker*, *The New York Times Book Review*, *The Washington Post*, and *The Times Literary Supplement*. He is currently at work on a book about the cultural afterlife of war crimes trials to be published by Princeton University Press.

Hilary Earl

Professor Earl is Associate Professor in the Department of History at Nipissing University in North Bay, Ontario, Canada. She received her Ph.D. in 2002 from University of Toronto in European History, her M.A. in 1992 from University of New Brunswick in European History and her B.A. in 1989 from University of New Brunswick in History. Dr. Earl's book, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958: Atrocity, Law, and History*, was published in June 2009 with Cambridge University Press. In 2009, she won a Research Achievement award at Nipissing University and won the University's Chancellor's Award for Excellence in Teaching. Additional awards and fellowships include 2005-2006 Nipissing University IRG; 2003 Fellowship Research Seminar: Interpreting Testimony, Center for Advanced Holocaust Studies, United States Holocaust Memorial Museum, Washington, D.C. (co-investigator); 2001-2002 Center for Advanced Holocaust Studies Research Fellowship, United States Holocaust Memorial Museum, Washington, D.C.; 1994-2000 University of Toronto Open Fellowship; 1997-1998

Leonard and Kathleen O'Brien Humanitarian Trust Fellowship; 1997-1998 Joint Initiative for German/ European Studies Dissertation Award; and 1994-1998 New Brunswick Women's Doctoral Fellowship.

Hon. Bruce J. Einhorn, ret.

The Honorable Bruce Einhorn is Adjunct Professor of Law and Director of the Asylum Clinic at Pepperdine University School of Law. He served as a federal immigration judge for seventeen years before retiring in 2007. Prior to his service on the court, he served as a special prosecutor and as Chief of Litigation for the U.S. Department of Justice's Office of Special Investigations. He regularly teaches a course on International Criminal Law.

David Fraser

Professor Fraser is Professor of Law and Social Theory at the University of Nottingham. His primary research focus is on legal systems under National Socialism and law and the Holocaust generally. In 2003, he was a Charles H. Revson Foundation Fellow at the Center for Advanced Holocaust Studies at the United States Holocaust Memorial Museum in Washington, D.C. He is the author of *The Fragility of Law: Constitutional Patriotism and the Jews of Belgium, 1940-1945* (Routledge, 2009), winner of the Hart Socio-Legal Book Prize, 2010, awarded for the most outstanding piece of socio-legal scholarship; *Law After Auschwitz: Towards a Jurisprudence of the*

Holocaust (Carolina Academic Press, 2005); *The Jews of the Channel Islands and the Rule of Law, 1940-1945* (Sussex Academic Press, 2000).

Stanley A. Goldman

Professor Goldman is Professor of Law and Director of the Center for the Study of Law and Genocide at Loyola Law School. There his courses have included Law and Genocide, Criminal Law, Evidence and Criminal Procedure and Legal Ethics. Prior to becoming a full-time professor at Loyola he spent approximately eight years in the office of the Los Angeles County Public Defender. From 1996-2006, he was Legal Editor and then Legal Affairs Editor for Fox News Channel. Professor Goldman has appeared as a legal analyst for numerous media outlets including CBS National Network Radio and CNN.

Gregory S. Gordon

Professor Gordon is the Director of the University of North Dakota Center for Human Rights and Genocide Studies and teaches human rights and international and criminal law at the University of North Dakota School of Law. Before joining the legal academy, he was a Senior Trial Attorney for the U.S. Department of Justice's Office of Special Investigations. He previously worked with the Office of the Prosecutor for the International Criminal Tribunal for Rwanda, where he served as Legal Officer and Deputy Team Leader for the landmark media cases,

the first international post-Nuremberg prosecutions of radio and print media executives for incitement to genocide. His scholarship has been published in leading international publications and focuses on both the substantive and procedural aspects of human rights and international criminal law.

Michael J. Kelly

Professor Kelly is Professor of Law and Associate Dean for International Programs and Faculty Research at Creighton University School of Law. He has served as chair of the Association of American Law Schools (AALS) Section on National Security Law and is president of the U.S. National Chapter of L'Association International du Droit Pénal, a Paris-based society of international criminal law scholars, judges and attorneys founded in 1924 that enjoys consultative status with the United Nations. His research and teaching focuses on the fields of international and comparative law and Native American law. He is the author and co-author of four books and over thirty articles and book chapters in these areas. He has taught International Criminal Law for over a decade.

Matthew Lippman

Professor Lippman is Professor of Criminology, Law, and Justice at the University of Illinois at Chicago, where he is a Master Teacher in the College of Liberal Arts and Sciences. He is also an Adjunct Professor of

Law at John Marshall Law School in Chicago. Professor Lippman is a leading expert on the law of genocide and has written extensively on the Nuremberg trial and on other post-World War II prosecutions of Nazi war criminals. He teaches courses on international criminal law and genocide and the Holocaust. His most recent work centers on the legal profession in Nazi Germany, the extradition of Nazi war criminals and on the Genocide Convention. He recently completed a series of ten articles which review the post-World War II trials of German industrialists, lawyers, doctors, concentration camp officials, diplomats and military leaders. Dr. Lippman is also one of the leading legal writers on genocide and the 1948 Convention On The Punishment And Prevention Of The Crime Of Genocide. He has been cited or excerpted in leading international law texts and in various texts on criminal procedure as well as by the International Court of Justice and other international tribunals.

Michael Marrus

Professor Marrus is the Chancellor Rose and Ray Wolfe Professor Emeritus of Holocaust Studies and a Fellow of Massey College. A Fellow of the Royal Society of Canada and a member of the Order of Canada, he received an M.A. and Ph.D. from the University of California at Berkeley – and more recently, a Master of Studies in Law at the University of Toronto. He has been a visiting fellow of St. Antony's College, Oxford; the Institute for Advanced

Studies of the Hebrew University of Jerusalem; and has taught as a visiting professor at the University of California, Los Angeles; and the University of Cape Town, South Africa. His recent teaching, both in Law and History, focuses on political trials. He is the author of several books, including *Vichy France and the Jews* (with Robert Paxton) (Basic Books, 1981); *The Unwanted: European Refugees in the Twentieth Century* (Oxford University Press, 1985); *The Holocaust in History* (New American Library, 1989); and *The Nuremberg War Crimes Trial, 1945-46* (Bedford Books, 1997). He has recently published a book on the Holocaust-era restitution campaign of the 1990s, entitled *Some Measure of Justice* (University of Wisconsin Press, 2009).

Fionnuala D. Ní Aoláin

Professor Ní Aoláin is concurrently the Dorsey & Whitney Chair in Law at the University of Minnesota Law School and a Professor of Law at the University of Ulster's Transitional Justice Institute in Belfast, Northern Ireland. In 2008, she was invited to participate as an expert in an Expert Seminar organized by the Working Group "Protecting human rights while countering terrorism" of the United Nations Counter-Terrorism Implementation Task Force. She has previously been Visiting Scholar at Harvard Law School (1993-94); Visiting Professor at the School of International and Public Affairs, Columbia University (1996-2000); Associate Professor of Law at the Hebrew University in Jerusalem, Israel (1997-99); and Visiting

Fellow at Princeton University (2001-02). Her most recent book, *Law in Times of Crisis* (Cambridge University Press, 2006), was awarded the American Society of International Law's preeminent prize in 2007: the Certificate of Merit for creative scholarship. She is also the author of "Sex-Based Violence and the Holocaust – A Re-evaluation of Harms and Rights in International Law," 12 *Yale J.L. & Feminism* 43 (2000). She was a representative of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia at domestic war crimes trials in Bosnia (1996-97). In 2003, she was appointed by the Secretary-General of the United Nations as Special Expert on promoting gender equality in times of conflict and peace-making. She has been nominated twice by the Irish government to the European Court of Human Rights, in 2004 and 2007, the first woman and the first academic lawyer to be thus nominated. She was appointed by the Irish Minister of Justice to the Irish Human Rights Commission in 2000 and served until 2005.

Burt Neuborne

Professor Neuborne is Inez Milholland Professor of Civil Liberties and Legal Director, Brennan Center for Justice at New York University School of Law. He has acted as plaintiffs' lead co-counsel and is special court-appointed settlement counsel in the recent Holocaust-era litigation against the Swiss banks, and also served as plaintiffs' lead co-counsel in the litigation against German industry for Holocaust-era crimes. He was also a commentator and advisor to

Court TV for their 50th anniversary commemoration of the Nuremberg trials. A former National Legal Director of the American Civil Liberties Union, he is a graduate of Harvard Law School from where he received an LL.B in 1964.

Pier Paolo Rivello

Professor Rivello is Professor of Criminal Procedure at the University Bocconi of Milan, Italy. He is also the President of the Military Tribunal in Rome and the former Chief Prosecutor at Turin, Italy, where he prosecuted former Nazi officials. Among his several books are *Lezioni di diritto penale militare* [Lessons of Military Criminal Law] (Giappichelli, 2007); *Giurisdizione penale internazionale* [International Criminal Jurisdiction] (Giappichelli, 2000), *Il dibattimento nel processo penale* [The trial in criminal proceedings] (UTET, Turin, 1997); *Quale giustizia per le vittime dei crimini nazisti?* [What justice for victims of Nazi crimes?] (Giappichelli, 2002). He has also edited two volumes on military justice. Some of his many articles include Le "risposte" nazionali ai crimini di guerra: analisi di una serie di incertezze e lacune [The "National" Answers To War Crimes: Analysis of Some Uncertainties and Gaps], 58 *La Comunita Internazionale* 47 (2003) and The Prosecution of War Crimes Committed by Nazi Forces in Italy, 3 *J. Int'l Crim. Just.* 422 (2005).

Christoph J.M. Safferling

Professor Safferling is professor of criminal law, criminal procedure, international criminal law and public international law at the Philipps-University of Marburg, in Marburg, Germany. At the University of Marburg, he also serves as the Director of the International Research and Documentation Center for War Crimes Trials. He is also the Whitney R. Harris International Law Fellow of the Jackson Center, Jamestown, New York, and a member of the advisory board to the city of Nuremberg regarding the "Memorial Nuremberg Trials." Alongside several articles in the fields of criminal law, international law and human rights law, he has published *Towards an International Criminal Procedure* (Oxford University Press, 2003); *The Nuremberg Trials: International Criminal Law Since 1945* (Saur, 2006); and edited the German translation of Whitney Harris' *Tyranny on Trial [Tyrannen vor Gericht]* (BWV 2009).

162

(3)

No. 09-1262

Supreme Court, U.S.
FILED
MAY 19 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

PRESBYTERIAN CHURCH OF SUDAN, et al.,

Petitioners,

v.

TALISMAN ENERGY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF DAVID J. SCHEFFER, DIRECTOR OF THE CENTER FOR INTERNATIONAL HUMAN RIGHTS, AS AMICUS CURIAE IN SUPPORT OF THE ISSUANCE OF A WRIT OF CERTIORARI

DAVID J. SCHEFFER, ESQ.
CENTER FOR INTERNATIONAL HUMAN RIGHTS
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
375 East Chicago Avenue
Chicago, Illinois 60611-3069
(312) 503-8579
d-scheffer@law.northwestern.edu
Amicus Curiae

May 19, 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. ARTICLE 25(3)(c) OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT DOES NOT REFLECT CUSTOMARY INTERNATIONAL LAW	5
A. The substantive crimes within the jurisdiction of the International Criminal Court were drafted to reflect customary international law	7
B. The general principles of law and other key provisions of the Rome Statute were not all drafted to reflect customary international law	9
C. Article 25(3)(c) of the Rome Statute was not drafted to reflect customary international law	11
II. THE MENS REA REQUIREMENT FOR AIDING AND ABETTING UNDER THE ROME STATUTE IS AMBIGUOUS BUT CAN BE REASONABLY INTERPRETED AS A KNOWLEDGE STANDARD	14
A. Article 25(3)(c) is reasonably read with a knowledge standard because imposition of an intent standard would destroy the distinction between aider or abettor and co-perpetrator	15

TABLE OF CONTENTS – Continued

Page

B. Article 25(3)(c) must be interpreted together with the general principle of law on mental element set forth in Article 30(2)(b) of the Rome Statute..... 17

C. The "purpose" requirement was not added to Article 25(3)(c) during the Rome negotiations to require a shared intention by the aider or abettor and the perpetrator of the crime..... 21

III. THIS COURT SHOULD GRANT CERTIORARI TO CONFIRM THAT LOWER COURTS CANNOT RELY UPON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT FOR A RULE OF CUSTOMARY INTERNATIONAL LAW ON AIDING AND ABETTING LIABILITY 25

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998) 15

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 6, 8, 26, 27

The Presbyterian Church of Sudan et al. v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) 6, 16

U.S. STATUTE

28 U.S.C. § 1350 ..... 5, 6, 8, 22, 23

TREATY

Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (1998) ..... *passim*

BOOKS AND BOOK CHAPTERS

Albin Eser, *Individual Criminal Responsibility*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (Antonio Cassese, et al. eds. 2002) 14, 22

ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2d ed. 2008) 10, 14, 15

TABLE OF AUTHORITIES – Continued

Page

Donald K. Piragoff and Darryl Robinson, *Article 30: Mental Element*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 849 (Otto Trifftrer ed., 2d ed. 2008) 14, 20

Kai Ambos, *Article 25: Individual Criminal Responsibility*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 743 (Otto Trifftrer ed., 2d ed. 2008) 14

Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189 (Roy Lee ed., 1999) 12

WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (3d ed. 2007) 8, 10, 14, 18

WILLIAM A. SCHABAS, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (2010) 14, 21

WILLIAM A. SCHABAS, THE U.N. INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE (2006) 16

OTHER AUTHORITIES

Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 2 CRIM. L.F. 291 (2001) 14, 24

TABLE OF AUTHORITIES – Continued

Page

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June – 17 July 1998, Official Records, Volume III, U.N. Doc. A/CONF.183/13 (Vol. III) (2002).....17

INTEREST OF THE AMICUS CURIAE[1]

David J. Scheffer is the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law, where he teaches international human rights and criminal law and corporate human rights responsibility. He served as U.S. Ambassador-at-Large for War Crimes Issues (1997-2001) and counsel to the U.S. Permanent Representative to the United Nations (1993-1997). He was deeply engaged in the policy formulation, negotiations, and drafting of the constitutional documents governing the International Criminal Court. He led the U.S. delegation that negotiated the Rome Statute (Rome Statute of the International Criminal Court, adopted July 17, 1998, 2187 U.N.T.S. 90 (1998)), and its supplemental documents from 1997 to 2001. He was deputy head of the delegation from 1995 to 1997. On behalf of the U.S. Government, he negotiated the statutes of and coordinated support for the International Criminal Tribunals for the Former Yugoslavia and Rwanda, Special Court for Sierra Leone, and Extraordinary Chambers in the Courts of

---

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of my intention to file this amicus brief; all counsel have consented to the filing of this brief; and the consent letters have been filed with the Clerk of the Court with this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, made a monetary contribution to the preparation or submission of this brief.

Cambodia. He exercised responsibility within the U.S. Government for the investigation and prosecution of atrocity crimes (namely, genocide, crimes against humanity, and war crimes) on a global basis. He has written extensively about the tribunals, including the International Criminal Court, and the negotiations leading to their creation.

Ambassador Scheffer submits this brief out of concern that the Second Circuit erred in its analysis of the Rome Statute's mens rea provision for aiding and abetting liability, most particularly in the Second Circuit's conclusions that this provision of the Rome Statute was meant to reflect customary international law and that the accessorial liability of aiding and abetting arises only when there is shared intent with the perpetrator of the underlying crime. Neither conclusion is correct. Ambassador Scheffer believes this brief is necessary to clarify the meaning of the Rome Statute and aiding and abetting liability thereunder. The Second Circuit judgment reflects serious misunderstandings of the Rome Statute and it merits review by this Court.

SUMMARY OF ARGUMENT

The Second Circuit errs in drawing upon Article 25(3)(c) of the Rome Statute of the International Criminal Court as a demonstration of customary international law for aiding and abetting atrocity

crimes under the Court's subject matter jurisdiction. Article 25(3)(c) reads:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> . . . .
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission. . . .

This provision was a negotiated compromise among mostly common law and civil law governments after years of talks leading to the Rome Statute and was not finalized to express a rule of customary law.

The Rome Statute was never intended, in its entirety, to reflect customary international law. Some of the document's provisions – particularly those pertaining to the subject matter jurisdiction of the International Criminal Court – were negotiated for the purpose of codifying customary international law. However, many provisions were not so negotiated and clearly embody compromises unique to the treaty and to the operation of the International Criminal Court. Indeed, aiding and abetting liability remained an unresolved issue until very late in the negotiations. The final wording of Article 25(3)(c) is an example of compromise language far removed from any effort to mirror customary international law.

The Second Circuit further errs in concluding that the reference to "purpose" in Article 25(3)(c) of the Rome Statute establishes the requirement of a shared intent between the perpetrator of the crime and the aider or abettor. The negotiating history of Article 25(3)(c) demonstrates that there was no definitive agreement pointing to either an intention standard or a knowledge standard with respect to aiding and abetting liability. The compromise "purpose" language chosen for Article 25(3)(c) reflects the obvious point that an aider or abettor purposely acts in a manner that has the consequence of facilitating the commission of a crime, but the aider or abettor's intention cannot be established without reference to the mens rea principles set forth in Article 30 of the Rome Statute.[2] Since the judges of the International

---

[2] Article 30 of the Rome Statute reads in its entirety:

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
>
> 2. For the purposes of this article, a person has intent where:
>
> > (a) In relation to conduct, that person means to engage in the conduct;
> >
> > (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Criminal Court have had no occasion yet to interpret Article 25(3)(c), particularly in conjunction with Article 30, there is no judicial precedent from which to gain a definitive understanding by anyone of aiding and abetting liability under the Rome Statute. As it now stands, however, the Rome Statute can be reasonably construed as establishing, for purposes of cases before the International Criminal Court, a knowledge standard for aiding and abetting liability.

This Court should grant certiorari in order to examine whether the mens rea standard for aiding and abetting under the Alien Tort Statute (28 U.S.C. § 1350) should be determined by reference to Article 25(3)(c) of the Rome Statute, which represents a negotiated formula uniquely crafted for the International Criminal Court, or whether it should be ascertained from an examination of customary international law, which has long applied the knowledge standard.

ARGUMENT

I. ARTICLE 25(3)(c) OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT DOES NOT REFLECT CUSTOMARY INTERNATIONAL LAW

The Second Circuit holds that the mens rea standard for aiding and abetting liability under the Alien Tort Statute must be a "norm of international character accepted by the civilized world and defined

with a specificity comparable to the features of the 18th-century paradigms" recognized by this Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). Curiously, the Second Circuit looks to the Rome Statute of the International Criminal Court for definitive guidance by interpreting it as both adopting the purpose standard and embodying the customary international law standard of *Sosa* with respect to aiding and abetting liability. *The Presbyterian Church of Sudan et al. v. Talisman Energy, Inc.*, 582 F.3d 244, 258-259 (2d Cir. 2009). The Second Circuit errs on all counts with these findings. Petitioners correctly point out that customary international law has long established a knowledge standard for aiding and abetting liability and that federal common law, which is informed by customary international law, should guide the courts in determining accessorial liability under the Alien Tort Statute. Petition for Writ of Certiorari, The Presbyterian Church of Sudan et al. v. Talisman Energy, Inc., No. 09-1262 at 19-26 (2d Cir. April 15, 2010).

While fully embracing such reasoning, this amicus brief explicates two narrow but essential points not fully addressed elsewhere. The first objective is to explain, in this Part I, why Article 25(3)(c) of the Rome Statute, which the Second Circuit relies upon for its finding of a purpose standard, should not be interpreted as customary international law. Nonetheless, even if the provision were to be firmly settled as customary international law in the view of the federal judiciary, the second objective of

this amicus brief is to explain, in Part II, how the Second Circuit's interpretation of the wording of Article 25(3)(c) betrays both what transpired in the negotiations leading to the Rome Statute and how the mens rea standard for aiding and abetting is established under the treaty.

The Rome Statute is a negotiated treaty of considerable complexity designed to govern only the International Criminal Court. The Rome Statute was never intended, in its entirety, to reflect customary international law. Relatively few of the provisions of the Rome Statute merit that rigorous categorization and they do not include Article 25(3)(c). Nonetheless, the Second Circuit leaps to the conclusion that Article 25(3)(c) embodies customary international law.

Article 25(3)(c) was a negotiated compromise among primarily common law and civil law governments after years of talks leading to the Rome Statute and was not finalized to express a rule of customary law. There is no international consensus reflected in Article 25(3)(c), which in any event must be read in conjunction with Article 30, the mens rea provision of the Rome Statute.

A. The substantive crimes within the jurisdiction of the International Criminal Court were drafted to reflect customary international law

The provisions of the Rome Statute that the drafters understood were being negotiated to record

customary international law were the atrocity crimes defined in Articles 6 (genocide), 7 (crimes against humanity), and 8 (war crimes) of the treaty – the very provisions federal courts should be looking to for guidance about the *primary* violations of international law at stake in Alien Tort Statute litigation. *See* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 103 (3d ed. 2007).

For years the drafters, including myself and a team of State, Defense, and Justice Department lawyers working with our foreign counterparts, examined and debated the development of international humanitarian law and international criminal law to arrive at a general agreement as to what constituted customary international law for the substantive crimes that would be prosecuted before the International Criminal Court. Thus, if one applies the stringent universality requirements of *Sosa* to the Rome Statute, one can confidently identify the atrocity crimes defined therein as representing the types of crimes (or torts) that have universal character and are of such a magnitude that they fall within the jurisdictional scope of the Alien Tort Statute. But that sharp focus on customary international law never was the aim of the negotiations regarding *other* provisions of the Rome Statute, including the negotiations on accessorial liability. While some other articles of the Rome Statute happened, in the end, to reflect customary international law, Article 25(3)(c) is *not* one of them.

B. The general principles of law and other key provisions of the Rome Statute were not all drafted to reflect customary international law

The general principles of criminal law set forth in Articles 22-33 of the Rome Statute were intensively negotiated, often leading to compromises between common law and civil (Romano-Germanic) law countries in particular and with the active intervention of delegations schooled in *Sharia* law or other major legal systems. In some instances, the end product of this process of negotiation was a provision that mirrors customary international law. For example, the provisions of the Rome Statute that doubtless fall within this category include Articles 22 (*nullum crimen sine lege*), 23 (*nulla poena sine lege*), 24 (*non-retroactivity ratione personae*), 25(3)(e) (incitement to commit genocide), 32 (mistake of fact or mistake of law), and 67 (rights of the accused).

It would be erroneous to claim, however, following the deals struck and compromises arrived at during years of talks, that all of the provisions on general principles of law and all rules of evidence and procedure, penalties, and sentencing were reflections of customary international law – many were not. As explained above, negotiators labored very hard to create a subject matter jurisdiction of only crimes of customary international law, but the Rome Statute never would have come to pass if that standard of universal acceptance had been required for other

provisions, including all of the general principles of law.

For example, Article 33, a general principle of law on superior orders and prescription of law, was heavily negotiated, resulting in compromise language that does not mirror comparable provisions in the charters of the Nuremberg and Tokyo International Military Tribunals or the statutes of the other international or hybrid criminal tribunals of recent years. Indeed, the end result in Rome reflected more what was acceptable to NATO military commanders than what was desired by many other governments. The former President of the International Criminal Tribunal for the Former Yugoslavia, Professor Antonio Cassese, writes, "[Article 33] is at odds with customary international law, for it does not include *war crimes* in the category of offences with regard to which superior order [sic] enjoining their commission are always manifestly unlawful." ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 279 (2d ed. 2008).

Beyond the general principles of law, another example of negotiated compromise language arises with Article 77, which establishes a maximum sentence of life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person." Arab and Caribbean delegations strongly objected to the absence of the death penalty in the Rome Statute and would never concede that Article 77 reflects the maximum degree of punishment permitted under customary international law. WILLIAM A. SCHABAS, AN

INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 316 n. 17 (3d ed. 2007). Indeed, the U.S. Government would not concede that point.

C. Article 25(3)(c) of the Rome Statute was not drafted to reflect customary international law

Similarly, Article 25(3)(c) of the Rome Statute was negotiated not to codify customary international law but to accommodate the numerous views of common law and civil law experts about how, precisely, to express the mens rea of the aider or abettor. Per Saland, the Swedish Chairman of the Working Group on the General Principles of Criminal Law for years prior to and throughout the Rome Conference, writes that Article 25

> posed great difficulties to negotiate in a number of ways. One problem was that experts from different legal systems took strongly held positions, based on their national laws, as to the exact content of the various concepts involved. They seemed to find it hard to understand that another legal system might approach the issue in another way: e.g., have a different concept, or give the same name to a concept but with a slightly different content. . . . The text was also burdened with references to the mental element (e.g., intent and knowledge) because agreement had not yet been reached as to the text of a separate article dealing with the mental element in general terms.

Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 198 (Roy Lee ed., 1999).

As the lead U.S. negotiator, I do not recall hearing directly or being advised by my Justice Department team of negotiators of a single discussion prior to or during the Rome negotiations where the text of what laboriously became Article 25(3)(c) on aiding and abetting as a mode of participation was being settled as a matter of customary international law. It was a very contentious provision, with some delegations seeking explicit reference to intention, notwithstanding the important complication that the word "intention" has different meanings in different legal systems. In some countries, for example, passive intention is inferred from an actor's engaging in conduct with knowledge of some likely consequence of that conduct. Other delegations were wedded to the term "knowledge," believing that it better reflected the standard that was employed in their national practice and that had been endorsed in the jurisprudence of the Nuremberg and Tokyo International Military Tribunals and of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.

Negotiators struggled to find compromise wording and ultimately settled on using neither "intent" nor "knowledge" but "purpose." Reaching this compromise was made easier, in the end, by the prior resolution of the final language of Article 30, an article that deals expressly with the issue of the mental element of crimes. Finalizing the language of

Article 30 helped enormously, as it enabled negotiators to look to Article 30 for intent and knowledge standards while seeking an accommodation for Article 25(3)(c). However, if anyone had claimed we were writing customary international law on aiding and abetting liability in Article 25(3)(c), they would have been laughed out of the room.

Thus, the wording of Article 25(3)(c) was uniquely crafted for the International Criminal Court, and when read in conjunction with the mens rea standards set forth in Article 30 of the Rome Statute, leaves to the judges of the International Criminal Court the task of determining precisely the proper criteria for accessorial liability. Nothing discourages or prevents them from looking to the growing jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, to state practice, and to scholarly texts for guidance on this issue.

Article 25(3)(c) is not a statement of customary international law. Since the International Criminal Court has yet to interpret the provision's meaning and application with respect to accessorial liability for aiding and abetting, national courts can only speculate as to its scope and meaning; yet that speculation should be fully informed by the negotiating history. One pillar of certainty in that history is that Article 25(3)(c) has no standing as customary international law.

II. THE MENS REA REQUIREMENT FOR AIDING AND ABETTING UNDER THE ROME STATUTE IS AMBIGUOUS BUT CAN BE REASONABLY INTERPRETED AS A KNOWLEDGE STANDARD

In the years following the Rome Statute negotiations, scholars have debated what Article 25(3)(c) of the Rome Statute achieves – whether the provision creates a shared purpose requirement for aiding and abetting or whether, when joined with the mental element provision of Article 30, it builds upon long-standing and growing precedents from international and hybrid criminal tribunals that sustain the knowledge standard for aiding and abetting. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 74, 214-29 (2d ed. 2008); Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 2 CRIM. L.F. 291, 301-03 (2001); Donald K. Piragoff & Darryl Robinson, *Article 30: Mental Element*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 849, 854-55 (Otto Trifftrer ed., 2d ed. 2008); Kai Ambos, *Article 25: Individual Criminal Responsibility*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 743, 759-60 (Otto Trifftrer ed., 2d ed. 2008); WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 213 (3d ed. 2007); WILLIAM A. SCHABAS, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 435-46 (2010); Albin Eser, *Individual Criminal Responsibility*, *in* 1 THE

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 767, 798-801, 900-02 (Antonio Cassese, et al. eds., 2002). Such debate demonstrates that there are reasonable interpretations, one of them certainly being application of the knowledge standard. But until the judges of the International Criminal Court rule on the mens rea requirement for aiding and abetting under the Rome Statute, no national court can dictate that one standard (such as purpose or shared intention) negates a second standard (such as knowledge) in the International Criminal Court's constitutional framework or in its practice.

A. Article 25(3)(c) is reasonably read with a knowledge standard because imposition of an intent standard would destroy the distinction between aider or abettor and co-perpetrator

The great weight of international precedent has identified aiding and abetting with a knowledge standard. *See, e.g.*, ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 211, 214-18 (2d ed. 2008); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 234-35, 245 (Dec. 10, 1998); Brief for International Law Scholars William Aceves et al. as Amici Curiae Supporting Petitioners at 12-15, Presbyterian Church of Sudan, et al. v. Talisman Energy, Inc., No. 09-1262 (2d Cir. April 30, 2010). The Second Circuit nevertheless reached a contrary conclusion: "Thus, applying international law, we hold that the mens rea

standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone." *Presbyterian Church of Sudan, et al.*, 582 F.3d at 259.

Among the problems with this conclusion is that it obliterates the distinction between aiders and abettors, on the one hand, and perpetrators of atrocity crimes on the other hand. The character of atrocity crimes, which are massive assaults on civilian populations or egregious violations of the laws of war, means that: 1) the intention of the perpetrator can often be inferred more readily; and 2) the many additional participants in the vast criminal enterprise necessarily act with a multiplicity of intentions among them, but the aiders and abettors do so only knowing that their participation facilitates the intentional commission of the principal crime while they act upon their separate individual intentions, such as the pursuit of profit, survival, status, or even discrimination against the victims.

Professor William Schabas explains, "Some judgments [of the war crimes tribunals] have attempted to explain the distinction [between aiding and abetting and perpetration] in another way, stating that when the accomplice 'shares' the intent of the principal perpetrator, he or she becomes a 'co-perpetrator.'" WILLIAM A. SCHABAS, THE U.N. INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 307-08 (2006). Had the drafters of the Rome Statute meant to require an intent standard for aiding and abetting, they would have agreed to recast aiding and abetting more coherently as a co-perpetrator

mode of liability. But they did not. Consequently, a national court would be mistaken to identify the Rome Statute as somehow confirming a shared intention standard and denying the knowledge standard. The final wording of Article 25(3)(c) negated neither the large body of precedents for a knowledge standard in aiding and abetting liability nor the common sense reality of how atrocity crimes are committed.

B. Article 25(3)(c) must be interpreted together with the general principle of law on mental element set forth in Article 30(2)(b) of the Rome Statute

Negotiators repeatedly stumbled over what eventually was consolidated in Article 30 of the Rome Statute regarding the required mental element for all of the atrocity crimes, including the mental element for accessorial liability for such crimes. There remained a lingering and significant problem prior to Rome among largely common law and civil law delegations about precisely how the mens rea for aiding and abetting should be worded. The Preparatory Committee draft in spring 1998, which was the initial working draft in Rome, reflected this continued indecision with its draft language for the aiding and abetting provision: "[With [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists . . . " *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June –*

17 July 1998, Official Records, Volume III, U.N. Doc. A/CONF.183/13 (Vol. III) (2002), at 31.

It was only after negotiators reached Rome in the summer of 1998 that they finally arrived at compromise language. We knew that Article 30 of the Rome Statute, which deals with the required mental element, would be the agreed formula for how both intent and knowledge would be described and applied as the mental element for criminal acts, "[u]nless otherwise provided." Rome Statute, art. 30(1). The latter proviso relates to explicit formulations of intent and knowledge for some of the atrocity crimes defined in Articles 6, 7, and 8, for command responsibility under Article 28, and for participants in a "common purpose" under Article 25(3)(d)(ii). WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 224-25 (3d ed. 2007). But the proviso's relevance, if any, to Article 25(3)(c) is far from clear and was never confirmed in the negotiations.

The final text of Article 30(2)(b) easily captures the mens rea requirement for aiding and abetting, namely, "[i]n relation to a consequence, that person means to cause that consequence *or* is aware that it will occur in the ordinary course of events." (emphasis added). At Rome, negotiators did not relegate aiding and abetting to the first prong of this formulation – "means to cause that consequence" – which would have injected a shared intention standard into aiding and abetting. Rather, the intent of the aider or abettor is logically discovered within the awareness of the "consequence," namely that he or she who aids or

abets is someone who "is aware that [the consequence] will occur in the ordinary course of events." Rome Statute, art. 30(2)(b).

Article 25(3)(c)'s opening phrase, "For the purpose of facilitating the commission of such a crime," was agreed to in Rome during the final negotiations as an acceptable compromise phrase to resolve the inconclusive talks over whether to use the word "intent" or the word "knowledge" for this particular mode of participation. The "purpose" language stated the de minimus and obvious point, namely, that an aider or abettor purposely acts in a manner that has the consequence of facilitating the commission of a crime, but one must look to Article 30(2)(b) for guidance on how to frame the intent of the aider or abettor with respect to that consequence.

Donald Piragoff, lead Canadian Government negotiator on general principles of law throughout the years of negotiations culminating in Rome, writes about the relationship between aiding and abetting liability under Article 25(3)(c) and mental element requirements of Article 30(2):

> A question arises as to whether the conjunctive formulation [intent and knowledge] changes existing international jurisprudence that an accomplice (such as an aider or abettor) need not share the same *mens rea* of the principal, and that a knowing participation in the commission of an offence or awareness of the act of participation coupled with a conscious decision to participate is

> sufficient mental culpability for an accomplice. It is submitted that the conjunctive formulation has not altered this jurisprudence, but merely reflects the fact that aiding and abetting by an accused requires both knowledge of the crime being committed by the principal and some intentional conduct by the accused that constitutes the participation. . . . Article 30 para. 2(b) makes it clear that "intent" may be satisfied by an awareness that a consequence will occur in the ordinary course of events. This same type of awareness can also satisfy the mental element of "knowledge," as defined in article 30, para. 3. Therefore, if both "intent" and "knowledge" are required on the part of an accomplice, these mental elements can be satisfied by such awareness.

Donald K. Piragoff & Darryl Robinson, *Article 30: Mental Element*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 849, 855 (Otto Trifftrer ed., 2d ed. 2008).

There has been no ruling by the judges of the International Criminal Court on whether the "purpose" language in Article 25(3)(c) constitutes a form of specific intent, whereby evidence of a particular intention must be demonstrated and the mental element of Article 30(2)(a) or the first prong of Article 30(2)(b) ("that person means to cause that consequence") *must* be applied. For the present, the compromise struck in Article 25(3)(c) reflects the

ambiguity that uniquely characterizes the Rome Statute on aiding and abetting liability.

C. The "purpose" requirement was not added to Article 25(3)(c) during the Rome negotiations to require a shared intention by the aider or abettor and the perpetrator of the crime

The Second Circuit equates the "purpose to facilitate" requirement in Article 25(3)(c) with the perpetrator's intent to commit the crime, thus marrying the perpetrator's intent with that of the aider or abettor as a virtual co-perpetrator. That is a mistaken reading of the provision.

Professor William Schabas writes, "The purpose requirement was added during the Rome Conference, but nothing in the official records provides any clarification for the purposes of interpretation." WILLIAM SCHABAS, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 435 (2010). When the intention of the principal perpetrator is known to the aider or abettor, who nonetheless proceeds to assist such perpetrator in the commission of the principal crime, then aiding and abetting liability logically arises. This is so even though the aider or abettor acts with a different intention, which may be an intent that on its face is perfectly legal (such as seeking to profit from a business enterprise).

The most generous interpretation one can afford Article 25(3)(c) is that it connotes an inferred intent

from the act of providing assistance that one knows is facilitating the commission of a crime. That one can infer intent from knowledge is well established. For example, in the context of the Alien Tort Statute, while making a profit may be a corporation's primary objective, a secondary objective can arise in the realization that one's actions facilitate the commission of the crime and such knowledge can give rise to an inferred intent to *join* in the criminal conduct because it is profitable. In some cases – probably rare – a corporation may actually come to embrace not only its primary objective of making a profit, but also the criminal purpose of the perpetrator. But when that additional objective is fully embraced, it transforms the criminal character of the corporation from that of an aider or abettor into that of a full co-perpetrator of the crime. *See infra* at 15-17.

A small group of European scholars – with whom the Second Circuit seemingly aligns itself – seeks to impose a far-reaching and provocative interpretation on Article 25(3)(c), setting aside precedent and favoring a narrow interpretation that attaches to the defendant aider or abettor an intention to join the perpetrator in the commission of the underlying crime. *See* Albin Eser, *Individual Criminal Responsibility*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 767, 798-801, 900-02 (Antonio Cassese, et al. eds., 2002). Such a view, at the heart of the debate in Rome, would lead one to believe that the Rome Statute definitively establishes a whole new playing field for aiding and abetting

that, at a minimum, would have to be uniquely tailored for the International Criminal Court and far removed from any claim of customary international law.

The Second Circuit succumbs to the notion that insertion of the word "purpose" in Article 25(3)(c) must really mean a purpose or shared intent standard for aiding and abetting, when in reality the phrase "purpose to facilitate" was a compromise usage of those words to avoid any agreement on precisely the issue of shared intent. In Rome there was no agreement to so limit aiding and abetting to such a narrow range of liability requiring the finding of a shared intent to commit the underlying crime. That theory may exist in the aspirations of certain academics determined to declare victory ex post facto at Rome, but it has no reality in either the Rome Statute or the Alien Tort Statute.

Professor Roger Clark, a principal negotiator advising Samoa before and during the Rome Conference, writes:

> Article 25 sometimes uses terms like "purpose" and "with the aim of" that may need to be read in the light of article 30. Speaking generally, one who does not personally "do" the deed, must know of it and intend to associate himself with it. . . . There was considerable debate throughout the process about the conjunctive "and" between intent and knowledge [in Article 30]. Some delegations, the French in particular, insisted

> that both were necessary. Others of us, especially from common law jurisdictions, believed that the appropriate mental element for each separate material element had to be considered on its own merits. Particularly for circumstance elements, as the term "circumstance" is used in article 30(3) (and some consequence ones), knowledge (in the sense of awareness) might well be enough, although intent might be required as to other relevant elements. The debate shed more heat than light. In part, the differences of perspective coincided with the ease with which some of us are prepared to see several different material elements combining with appropriate mental elements (plural) to form "the offence," where others tend to see the material element, a global "thing," and a single intent/knowledge mental element which gets attached to that thing.

Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 2 CRIM. L.F. 291, 302-303 (2001). Only the judges of the International Criminal Court will sort this out when faced with a real case.

I believe, however, that when Article 25(3)(c) is interpreted by the judges of the International Criminal Court, they are more likely to discover the standard for aiding and abetting as it has developed in the jurisprudence of the international military tribunals at Nuremberg and Tokyo and the international

and hybrid criminal tribunals or recent years, in state practice, and in the writings of leading scholars: a knowledge standard of substantial assistance and an intent standard arising from awareness that the criminal consequence will occur in the ordinary course of events. A fair reading of Articles 25(3)(c), 30(2)(b), and 30(3) of the Rome Statute achieves such a standard.

III. THIS COURT SHOULD GRANT CERTIORARI TO CONFIRM THAT LOWER COURTS CANNOT RELY UPON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT FOR A RULE OF CUSTOMARY INTERNATIONAL LAW ON AIDING AND ABETTING LIABILITY

The ambiguity that burdens the meaning of aiding and abetting liability under Article 25(3)(c) of the Rome Statute one day will be replaced with clarity, but only by the judges of the International Criminal Court when they deliberate on a relevant case. Even then their ruling will not necessarily be formulated to reflect customary international law. Neither the Second Circuit nor this Court can substitute itself for their judgment about the Rome Statute's meaning. Scholars only can speculate at this stage. What can be stated with certainty is that Article 25(3)(c) was a negotiated compromise during the Rome negotiations that achieved the utilitarian objective of ensuring that aiding and abetting liability can be prosecuted before the International Criminal

Court, and that the provision was uniquely crafted for the Court and thus never negotiated as a rule of customary international law.

While the subject matter jurisdiction provisions of the Rome Statute offer a valuable resource for the federal courts in their determination of what violations of international law under the Alien Tort Statute meet this Court's standard set in *Sosa*, an examination of accessorial liability standards for aiding and abetting under the Rome Statute offers no such guidance. This Court would seriously misread the Rome Statute to award Article 25(3)(c) of the Rome Statute with the weighty significance of customary international law when the facts so clearly challenge that finding. Only the most self-inflated negotiators at Rome would hope for such a prize in the aftermath.

CONCLUSION

As a long-time participant in the American struggle over the merits and risks of the International Criminal Court, I find it ironic that the Second Circuit relies upon a mistaken reading of the Rome Statute to ascertain aiding and abetting liability. The United States has not ratified the Rome Statute because of continuing opposition from some quarters to its purported jurisdictional reach and even, in some respects, to its divergence from customary international law. Many of these critics no doubt would be

surprised to learn that a federal court is relying heavily on the unratified Rome Statute for guidance on a form of accessorial liability – aiding and abetting – so easily and correctly found within the federal common law. Even the *Sosa* standard, which focuses on determining the *primary* violations of international law that should qualify for Alien Tort Statute litigation, does not purport to abandon federal common law, which itself is informed by customary international law, with respect to *secondary*, or accessorial, liability standards.

For the above reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

DAVID J. SCHEFFER, ESQ.
CENTER FOR INTERNATIONAL HUMAN RIGHTS
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
357 East Chicago Avenue
Chicago, Illinois 60611-3069
(312) 503-8579
d-scheffer@law.northwestern.edu
Amicus Curiae

May 19, 2010

162

No. 09-1262

Supreme Court, U.S.
FILED
MAY 19 2010
OFFICE OF THE CLERK

Supreme Court of the United States

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A., FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KUEIGWONG RAT, LUKA AYUOL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG, on behalf of themselves and all others similarly situated,

Petitioners,

—v.—

TALISMAN ENERGY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE INTERNATIONAL COMMISSION OF JURISTS AND THE AMERICAN ASSOCIATION FOR THE INTERNATIONAL COMMISSION OF JURISTS, *AMICI CURIAE*, SUPPORTING PETITIONERS

WILLIAM J. BUTLER
Counsel of Record
STANLEY GELLER
A. HAYS BUTLER
International Commission of Jurists and the American Association for the International Commission of Jurists
280 Madison Avenue, Suite 1102
New York, New York 10016
(212) 725-5505
wjb1@mindspring.com

Attorneys for Amici Curiae

TABLE OF CONTENTS

PAGE

Table of Authorities iii

Interest of Amici Curiae 1

Summary of Argument 2

Argument 3

I. THE *MENS REA* FOR ACCOMPLICE LIABILITY UNDER CUSTOMARY INTERNATIONAL LAW IS KNOWLEDGE 3

A. Modern international tribunals uniformly hold that knowledge is the *mens rea* standard for accomplice liability 5

B. The Nuremberg Tribunals uniformly held that knowledge was the *mens rea* standard for accomplice liability 8

II. THE ROME STATUTE DOES NOT ALTER CUSTOMARY INTERNATIONAL LAW MAKING KNOWLEDGE THE *MENS REA* STANDARD FOR ACCOMPLICE LIABILITY 10

PAGE

A. The Rome Statute is a treaty that does not modify customary international law 11

B. The practice in countries, including those that have ratified the Rome Statute, does not support the proposition that purpose is the proper *mens rea* standard with respect to accomplice liability 13

C. The provisions of the Rome Statute with respect to accomplice liability are still uncertain and eventually may well be interpreted to be consistent with the customary international law standard of knowledge as the *mens rea* standard for such liability..... 14

Conclusion 18

TABLE OF AUTHORITIES

Cases: PAGE

Doe I v. Unocal Corp., 395 F.3d 932, 946-47 (9th Cir. 2002) 4

Filartiga v, Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (quoting *The Paquette Habana, infra,* 175 U.S. at 694) 18

Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007) ..2, 4, 5, 8, 14, 17

Muvunyi v. Prosecutor, ICTR-2000-55A-A, Judgment (Aug. 29, 2008) 6, 7-8

The Paquette Habana, 175 U.S. 677, 700... 4

Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009)..... 2, 4

Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 545 (Sept. 2, 1998)..... 6, 7

Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 249 (Dec. 10, 1998) 6, 17

Prosecutor v. Milutinovic et al., Case No. IT-05087-T, Judgment, vol. III, ¶ 281 ..... 6, 7

Prosecutor v. Musema, ICTR-96-13-T, Judgment and Sentence, ¶ 180 (Jan. 27, 2000) 6, 7

PAGE

Prosecutor v. Sainovic, et al., Case No. IT-05-87-A, p. 87-88 14

Prosecutor v. *Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 692 (May 7, 1997) 6

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 3

In re South African Apartheid Litigation, 617 F.Supp.2d 228 (S.D.N.Y. 2009) 5, 9, 15, 16

United States v. von Weizsaechecker (The Ministries Case). 14 Trials of War Criminals before the Nuremberg Military Tribunals under control council Law No. 10, 308, 622, *reproduced in* William S. Hein & Co., Inc. 1997 (1949) 8

Statutes:

Alien Tort Statute (ATS), 28 U.S.C. ¶ 1350, *et seq*..... 3, 17

Rome Statute of the International Criminal Court, July 17, 1998, U.N.T.S. 90, art. 10.....*passim*

Treaties and Conventions:

Rome Statute of the International Criminal Court, *supra*.....*passim*

PAGE

Vienna Convention on the Law of Treaties art. 31, May 23, 1969, U.N.T.S. 331 ... 12

Articles:

Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 Hastings L.J. 61, 88 (2008) 15

Miscellaneous:

Corporate Complicity & Legal Accountability, Report of the Panel of Legal Experts, I.C.J. 2008, p. 22. ..... 15, 16

Competence of the I.L.O. with respect to Agricultural Labour Case, P.C.I.J. Reports Series B, No. 2, pp. 39-40 (1922) 13

14 Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10 308, 622, William S. Hein & Co., Inc. 1997 ..... 8, 9

Military and Paramilitary Activities (Nicaragua v. U.S.), 1986 I.C.J. 14, 94 sec. 175 (June 27) 11, 12

Report of the [United Nations] Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808, Sec. 34, U.N. Doc. S/25708 (May 3, 1993) ... 5

United Nations International Law Commission's Draft Code of Crimes against Peace and Security of Mankind, Art. 2(3)(d) ILC Report 1996. p. 18..... 10

INTEREST OF AMICI CURIAE[1]

Amici Curiae consist of the International Commission of Jurists (ICJ) and its American section, the American Association for the International Commission of Jurists (AAICJ). The mission of the ICJ, a non-governmental organization based in Geneva, Switzerland, is to promote the understanding and observance of the rule of law and the legal protection of human rights throughout the world. The ICJ is comprised of 60 jurists of high standing in their own country or at the international level. The Commission meets on a biennial basis and elects an Executive Committee of seven members, which, in turn, meets twice a year. The Executive Committee appoints the Secretary General who is responsible for the daily work of the ICJ Secretariat.

Operations are financed in substantial part by a range of governments. The ICJ also receives funding from private foundations, including several American foundations, as well as private individuals. It enjoys consultative status with the United Nations Economic and Social Council, the African Union and the Council of Europe.

The ICJ promotes the rule of law through the work of its Secretariat in Geneva and its 82 sections and affiliates throughout the world. The AAICJ has been composed over the years of senior members of the American Bar as well as distin-

[1] The parties' written consents to the filing of this brief have been filed with the clerk. No counsel for any party has authored this brief in whole or in part, and no person other than amici curiae and their legal counsel made any monetary contribution to its preparation and submission.

guished members of the judiciary and academia. Financially independent from the Secretariat, the AAICJ conducts its own programs according to its own resource base.

SUMMARY OF ARGUMENT

Amicus curiae respectfully submits that the petition for a writ of certiorari filed by the plaintiffs in the present case be granted to allow the honorable Supreme Court to clarify a matter of great relevance for national and international law.

The Second Circuit Court of Appeals in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), erred in finding that customary international law (CIL) requires a *mens rea* of purpose for aiding and abetting liability. The accepted *mens rea* requirement for aiding and abetting liability under customary international law is knowledge, as a thorough review of the findings of the international criminal tribunals for Yugoslavia and Rwanda and the Nuremberg Military Tribunals clearly demonstrates. The decision of the Second Circuit Court substantially draws from Judge Katzmann's concurring opinion in *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), and reproduces the same mistake employing an incorrect approach when determining the content of customary international law; in particular, it failed to recognize that the Rome Statute of the International Criminal Court (ICC) is a treaty that does not necessarily modify prevailing CIL norms. The reasoning of the Court of Appeals, following closely Judge Katzmann's conclusions with regard

to *mens rea*, obscures the fact that the knowledge standard has been consistently applied by international courts construing customary international law and fully satisfies the criteria for liability under the Alien Tort Statute (ATS), 28 U.S.C.A. § 1350, as set forth in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The Second Circuit panel's analysis of customary international law in *Talisman* incorporated Judge Katzmann's errors, leading the panel mistakenly to apply a *mens rea* standard of purpose instead of the correct *mens rea* standard of knowledge.

ARGUMENT

I. THE *MENS REA* FOR ACCOMPLICE LIABILITY UNDER CUSTOMARY INTERNATIONAL LAW IS KNOWLEDGE

The Supreme Court has been asked by plaintiffs to find in the alternative that accessory liability (aiding and abetting) should be based on the standards of international criminal law. If the Court so decides, the Court should find guidance in established international customary criminal law as international courts and tribunals set it.

When determining whether a violation of international law is cognizable under the ATS, courts must ascertain whether the offense violates a norm of customary international law: that is, a "norm of international character accepted by the civilized world and defined with a specificity comparable to . . . 18th-century paradigms" such as "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa v. Alvarez-Machain, supra*, 543 U.S. at 724-25.

Where the United States has not ratified a treaty concerning the norm in question, courts may look to "the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators . . . not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *The Paquete Habana,* 175 U.S. 677, 700. Courts have held that aiding and abetting a violation of customary international law may lead to individual liability under the ATS, *see, e.g., Khulumani v. Barclay Nat'l Bank Ltd., supra,* 504 F.3d at 260; *Doe I v. Unocal Corp.*, 395 F.3d 932, 946-47 (9th Cir. 2002), and the *Talisman* panel subsequently found that the *actus reus* and *mens rea* for such liability should be determined by reference to international law, rather than to federal common law. *Presbyterian Church of Sudan v. Talisman, supra,* 582 F.3d at 258-59.

Amicus respectfully draws the attention of the sources of international law that should be looked at in determining the constitutive elements of aiding and abetting. In particular, to the fact that under customary international law the standard for the *mens rea* element of aiding and abetting is "knowledge" and not "purpose" as the *Talisman* panel erroneously suggests. This error should be corrected so that the Supreme Court of the United States applies the right law and contributes to the strengthening of the international rule of law.

A. Modern international tribunals uniformly hold that knowledge is the *mens rea* standard for accomplice liability.

The Second Circuit panel in *Talisman* erred as a matter of law in finding that the *mens rea* standard for aiding and abetting liability under customary international law is purpose. A thorough review of the relevant international sources, as the court for the Southern District of New York undertook in *In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009), clearly demonstrates that the correct standard is knowledge.

Judge Katzmann in *Khulumani* was correct in regarding the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) as authoritative interpreters of customary international law. 504 F.3d at 274. The ICTY's mandate, as defined by the UN Security Council, requires the tribunal to apply "rules of international humanitarian law which are beyond any doubt part of customary [international] law." 504 F.3d at 274 (quoting Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, ¶ 34, U.N. Doc. S/25704 (May 3, 1993)). Both tribunals were created by the United Nations Security Council, and their decisions carry legal authority.

Both the ICTY and ICTR, in construing customary international law, have uniformly required a *mens rea* of knowledge for aiding and abetting liability. The tribunals have unvaryingly applied the knowledge standard in aiding and abetting cases since initially confronting the question in

1997. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 692 (May 7, 1997). *See also Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 545 (Sept. 2, 1998); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 249 (Dec. 10, 1998); *Prosecutor v. Musema*, ICTR-96-13-T, Judgment and Sentence, ¶ 180 (Jan. 27, 2000); *Muvunyi v. Prosecutor*, Case No. ICTR-2000-55A-A, Judgment (Aug. 29, 2008), ¶ 79; *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87-T, Judgment, vol. III, ¶ 281 (Feb. 26, 2009).

In *Tadic*, the ICTY held that "the accused will be found criminally culpable for any conduct where it is determined that he *knowingly* participated in the commission of an offense that violates international humanitarian law," so long as his participation also meets the *actus reus* requirement. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 692 (May 7, 1997) (emphasis added). The Tribunal confirmed this holding shortly thereafter in *Furundzija*, finding that the *mens rea* required for aiding and abetting liability under international law "is the *knowledge* that [one's] acts assist the commission of the offense," and adding that "it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed," so long as "he is *aware* that one of a number of crimes will probably be committed, and one of those crimes is in fact committed." *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 246, 249 (Dec. 10, 1998).

A few months before the ICTY issued the *Furundzija* judgment, the ICTR independently made a similar finding with regard to complicity

in genocide, holding that an accused could be liable "if he *knowingly* aided or abetted . . . one or more persons in the commission of genocide, while *knowing* that such a person or persons were committing genocide, *even though the accused himself did not have the specific intent*" to commit the crime. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 545 (Sept. 2, 1998). The ICTR has since upheld this knowledge standard in *Musema*, finding that the *mens rea* requirement for aiding and abetting liability was fulfilled if the accused "knew or had reason to know" that the principal intended to commit genocide, even if the accused did not share the principal's intent. *Prosecutor v. Musema*, ICTR-96-13-T, Judgment and Sentence, ¶¶ 180-83 (Jan. 27, 2000) (cited in 395 F.3d at 951).

The ICTY and ICTR continue to uphold the knowledge standard in aiding and abetting cases. In the 2009 case *Prosecutor v. Milutinovic*, the ICTY stated with regard to aiding and abetting liability: "As for the required mental element, it must be proved . . . that Milutinovic *knew* that his actions or omissions were providing practical assistance, encouragement, or moral support to the commission of the crimes and that he was *aware* of the physical or intermediary perpetrator's intent to commit crimes." *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87-T, Judgment, vol. III, ¶ 281 (Feb. 26, 2009) (emphasis added). In late 2008, the ICTR made the same finding: "The requisite mental element of aiding and abetting is *knowledge* that the acts performed assist the commission of the specific crime of the principal perpetrator." *Muvunyi v. Prosecutor*, Case No.

ICTR-2000-55A-A, Judgment, ¶ 79 (Aug. 29, 2008) (emphasis added).

In sum, both the ICTY and ICTR, in construing customary international law have uniformly upheld a *mens rea* requirement of knowledge for aiding and abetting liability. This consistency over more than a decade of jurisprudence clearly demonstrates that the universally accepted *mens rea* requirement for aiding and abetting liability under customary international law is knowledge, not purpose.

B. The Nuremberg Tribunals uniformly held that knowledge was the *mens rea* standard for accomplice liability.

The Second Circuit panel in *Talisman* relied on Judge Katzmann's concurring opinion in *Khulumani* in mistakenly interpreting *The Ministries Case* as requiring a *mens rea* of purpose rather than knowledge for accomplice liability, when in fact the Nuremberg Military Tribunals uniformly applied a knowledge standard. 504 F.3d at 276 (citing *United States v. von Weizsaecker (The Ministries Case), in* 14 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* 308, 622 (William S. Hein & Co., Inc. 1997) (1949) (hereinafter "14 *Trials of War Criminals*")). The Second Circuit's decision in *Talisman* then extrapolated from its misinterpretation of this single case to conclude that "international law at the time of the Nuremberg trials recognized aiding and abetting liability only for purposeful conduct." 582 F.3d 259. In fact, the decision in *The Ministries Case* also rests on the standard of knowledge. In its *mens rea* analysis,

the tribunal found that defendant Rasche, a banker, knew that the loans he made would be used to support slave labor:

> The defendant is a banker and businessman of long experience and is possessed of a keen and active mind. Bankers do not approve or make loans in the number and amount made by the Dresdner Bank without ascertaining, having, or obtaining information or knowledge as to the purpose for which the loan is sought, and how it is to be used. It is inconceivable to us that the defendant did not possess that knowledge, and we find that he did.

14 *Trials of War Criminals* at 622. The Tribunal then went on to consider whether the act of making such a loan was sufficient to fulfill the *actus reus* requirement, concluding that it was not. *Id.*

Thus, the correct inference to be drawn from *The Ministries Case* is that the Tribunal applied a *mens rea* requirement of knowledge for aiding and abetting liability. The court in *In re South African Apartheid Litigation* adopted this view, stating that the tribunal's finding in *The Ministries Case* "does not deviate" from "the universal knowledge requirement found in international jurisprudence" for aiding and abetting liability. 617 F.Supp.2d at 260. Such an inference is further supported by the tribunal's uniform and explicit use of the knowledge standard in other passages of the Ministries case. For instance, in the case of Puhl, who took part in the sale of stolen property from Holocaust victims, the tribunal explicitly rejected a purpose standard: "the matter (. . .) was probably repugnant" to Puhl but it was sufficient for his convic-

tion that he "knew that (it) was stolen property". *Ministries Case* p. 620-621.

The legacy of the Nuremberg Military Tribunals was adequately affirmed by the UN International Law Commission's Draft Code of crimes against Peace and Security of Mankind, which in Article 2(3)(d) stated: "An individual shall be responsible for a crime . . . if that individual . . . knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime". *ILC Report* 1996, p. 18.

II. THE ROME STATUTE DOES NOT ALTER CUSTOMARY INTERNATIONAL LAW MAKING KNOWLEDGE THE *MENS REA* STANDARD FOR ACCOMPLICE LIABILITY

The Second Circuit court, again relying on Judge Katzmann's concurrence, was mistaken in concluding that the Rome Statute of the International Criminal Court requirement of a *mens rea* of purpose for aiding and abetting liability is reflective of customary international law. The Rome Statute is a treaty that is binding only on those States that ratify it and its standards do not automatically modify or derogate from customary international law. At best, its standards for aiding and abetting are still uncertain since the Court has not yet pronounced itself on the contents of those standards.

A. The Rome Statute is a treaty that does not modify customary international law.

Under international law, custom and conventions are separate sources and their interaction cannot always be seen as one in which one always modifies the other. It is a well settled rule of international law that the conclusion of a treaty does not automatically "deprive [a] customary norm of its separate applicability." *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 94, ¶ 175 (June 27).

Even if Article 25 of the ICC statute, which is ambiguously worded with regard to *mens rea*, is read to support the application of a purpose standard, this standard will constitute *lex specialis* and, under article 10, must not be regarded as "limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, art. 10; *accord* 617 F.Supp.2d at 260-61. To find, as the Second Circuit's decision in *Talisman* did, that the Rome Statute heightens the *mens rea* requirement for aiding and abetting liability under customary international law is to contravene the text of the statute itself.

As the ICJ explained in *Nicaragua*, a treaty on a subject relevant to a norm of customary international law cannot, without more, be understood as codifying, supplanting, or modifying that norm: "[E]ven if a treaty norm and a customary norm . . . were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must neces-

sarily deprive the customary norm of its separate applicability." *Nicar. v. U.S., supra,* ¶ 175. Where a treaty provides specifically that it must not be interpreted as modifying norms of customary international law, as the Rome Statute does, this stricture must be followed. Vienna Convention on the Law of Treaties art, 31(1), May 23, 1969, 1155 U.N.T.S. 331 ("[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"). Therefore, the Second Circuit's decision in Talisman's interpretation of the Rome Statute as requiring a *mens rea* of purpose for aiding and abetting liability, even if correct, has no bearing upon the prevailing *mens rea* requirement of knowledge for aiding and abetting liability under customary international law.

Mere logic and sound understanding of the way sources of international law operate would also lead to the conclusion that the purpose standards in the Rome Statute cannot be regarded as customary international law. If purpose was the standard under customary international law by virtue of the Rome Statute, then all countries should have an obligation to adopt that standard or else violate their international obligations (see Prosecutor brief, Odjanic), which manifestly is not the case.

Inasmuch as the Rome Statute is an international treaty binding only those countries that have ratified it, and the United States of America has not ratified the treaty, the Supreme Court in principle has no obligation to apply the treaty unless it represents customary international law.

B. The practice in countries, including those that have ratified the Rome Statute, does not support the proposition that purpose is the proper *mens rea* standard with respect to accomplice liability.

Under international law of treaties as set forth in Article 31(3) of the Vienna Convention of the Law of Treaties 1969 and now part of customary international law, subsequent practice of countries provides important clues as to the meaning they attach to their obligations under international treaties. *Competence of the I.L.O. with Respect to Agricultural Labour case. P.C.I.J. Reports Series B, No.2,* pp. 39-40 (1922). The practice in countries that are parties to the Rome Statute treaty shows that most of them have adopted standards lower than "purpose" and compatible with the requirement of a knowledge standard for the *mens rea* element of aiding and abetting. This strongly suggests that these countries do *not* regard their obligations under the treaty as imposing an obligation to require "purpose" as the *mens rea* element of the crime of aiding and abetting.

Countries from civil law tradition such as Germany, Switzerland, and the Netherlands, require that the accused be aware of the possibility that his act will assist the main perpetrator and accept this circumstance. Others such as Croatia, Montenegro and Macedonia require intent (including *dolus eventualis*) which is a lower standard than purpose. African jurisdictions influenced by this tradition such as Rwanda, Burrundi and the Democratic Republic of the Congo also require knowledge. Most countries in the former Soviet

Union (e.g. Kazakhstan, Azerbaijan, and the Russian Federation) require indirect intent, which relies partly on awareness of a possibility. Latin American countries generally require *dolus*, including *dolus eventualis*, where knowledge of the possibility that a crime will be committed is part of it. *Prosecution Response to General Ojdanic's amended Appeal Brief (public redacted), The Presecutor v. Sainovic, et al.*, Case No. IT-05-87-A, p. 87-88.

Countries whose legal system is influenced by the common law tradition generally require knowledge for the *mens rea* of aiding and abetting. Such is the case of English law, Australian and South African law. *Ibid.* p. 88-89.

C. The provisions of the Rome Statute with respect to accomplice liability are still uncertain and eventually may well be interpreted to be consistent with the customary international law standard of knowledge as the *mens rea* standard for such liability.

In his concurrence in *Khulumani*, Judge Katzmann himself conceded that the Rome Statute "has yet to be construed by the International Criminal Court" and that "its precise contours and the extent to which it may differ from customary international law thus remain somewhat uncertain." 504 F.3d at 275-76; 582 F.3d at 259.

It has been suggested that the Rome Statute requires a *mens rea* of purpose for accomplice liability in Article 25(3)(c)-(d), which reads as follows:

> In accordance with this Statute, a person shall be criminally responsible and liable

> for punishment for a crime within the jurisdiction of the Court if that person: . . .
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> > (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
> >
> > (ii) Be made in the knowledge of the intention of the group to commit the crime. Rome Statute, art. 25(3)(c)-(d); 504 F.3d 275.

At first glance, part (c) may appear to impose a purpose standard for aiding and abetting liability, as Judge Katzmann suggested. However, as the court in *In re South African Apartheid Litigation* observed, it is unclear whether the statute's drafters intended for "purpose" to encompass "purpose as inferred from knowledge of likely consequences." 617 F.Supp.2d at 261 (quoting Chimene I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 Hastings L.J. 61, 88 (2008)) See also *Corporate Complicity & Legal Accountability*,

Report of the Panel of Legal Experts, ICJ 2008, p. 22. This possibility gains support from part (d), *supra*, which includes both purpose and knowledge as permissible *mens rea* for joint criminal enterprise liability. It also receives support from article 30 ("Mental element"), which suggests that a *mens rea* of knowledge is sufficient for accomplice liability under the statute. The article reads:

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
>
> 2. For the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to a consequence, that person means to cause that consequence or *is aware that it will occur in the ordinary course of events*. . . . [Emphasis added.]

The court in *In re South African Apartheid Litigation* construed article 30 to mean that "even assuming that '*[f]or the purpose of* facilitating the commission of such crime' in Article 25(c) carries an intent requirement," "intent" as defined in article 30 "does not require that an aider or abettor share the primary actor's purpose. . . . [T]he aider or abettor may be held liable if he or she *is aware* that the assistance provided will substantially assist the commission of crimes in violation of the

law of nations." 617 F.Supp.2d at 262 (emphasis supplied). The ICTY reached the same conclusion in *Furundzija*, suggesting that Article 30 imposes a *mens rea* requirement of knowledge. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment ¶ 244 (Dec. 10, 1998).

The Second Circuit panel in *Talisman* concluded that only the purpose standard (to the exclusion of the knowledge standard) is supported by a sufficient consensus in international law for the purposes of the ATS, 582 F.3d at 258-59. As discussed above, this conclusion is incorrect: sources of customary international law uniformly prescribe a *mens rea* of knowledge for aiding and abetting liability. However, Judge Katzmann stated in his concurrence in *Khulumani* that his research had "revealed no source of international law that recognizes liability for aiding and abetting a violation of international law but would not authorize the imposition of such liability on a party who acts the purpose of facilitating that violation." 504 F.3d at 376-77. This statement formed the underpinning of the Second Circuit's holding in *Talisman* with regard to *mens rea*. 582 F.3d at 258-59. Unfortunately, Judge Katzmann's use of the double negative ("no source of international law that . . . would not authorize the imposition" of aiding and abetting liability where the party acted purposefully) again obscured the fact that although this claim is literally true, *cf.* Model Penal Code § 2.02(5), international legal sources uniformly impose aiding and abetting liability on parties who act with the lesser *mens rea* of knowledge, not only on those who act with purpose.

CONCLUSION

As a careful review of the decisions of international criminal tribunals construing customary international law makes plain, the *mens rea* requirement for aiding and abetting liability under customary international law is knowledge. The decisions of these tribunals have been uniform and unambiguous, demonstrating that the knowledge *mens rea* requirement has "ripened . . . into 'a settled rule of international law' by 'the general assent of civilized nations.' " *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (quoting 175 U.S. at 694). The Rome Statute is *lex specialis* and does not modify this customary international law *mens rea* requirement of knowledge, although the statute may itself be interpreted as adopting (and thereby supporting) the knowledge standard. The Second Circuit panel in *Talisman* thus erred as a matter of law in finding that customary international law requires a *mens rea* of purpose for aiding and abetting liability: the correct *mens rea* requirement is knowledge. The Supreme Court should grant review so that these fundamental errors that affect the application of international law in the United States are corrected.

Respectfully submitted,

WILLIAM J. BUTLER
Counsel of Record
STANLEY GELLER
A. HAYS BUTLER
International Commission of
Jurists and the American
Association for the International
Commission of Jurists
280 Madison Avenue, Suite 1102
New York, New York 10016
(212) 725-5505
wjb1@mindspring.com

Attorneys for Amici Curiae

RECORD PRESS, INC., 229 West 36th Street, N.Y. 10018—26953—(212) 619-4949
www.recordpress.com